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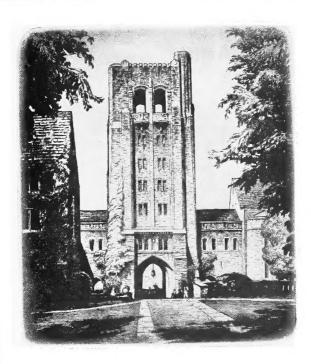
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ARRANGED, ANNOTATED, AND EDITED BY

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By IRVING BROWNE,

Formerly Editor of the American Reports, &c.

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### DIGEST

OF THE

### LAW OF PROPERTY IN LAND

PART III.
USES AND PROFITS OF LAND

#### A DIGEST

OF

### THE LAW OF

# USES AND PROFITS

OF

## LAND

 $\mathbf{BY}$ 

STEPHEN MARTIN LEAKE

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#### PREFACE.

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THE present work forms the third Part of a Digest of the Law of Property in Land, of which the two preceding Parts have been already published in a separate volume. In the Introduction to that volume the plan of the whole work, and the position in it of the present Part, was fully explained. It is therefore sufficient here to repeat that, according to the arrangement there proposed, Part I. treats of the Sources of the law of property in land; Part II. treats of the various Estates and Limitations of interest in land; Part III., contained in the present volume, treats of the beneficial Uses and Profits of which land is legally capable, and the appropriation of them to the various estates and interests which may be held in land; Part IV, is intended to treat of the Transfer of Property in land in all its branches; and the concluding Part V. is intended to explain the modifications of all the preceding law required by reason of the various conditions and capacities of Persons.

The first Part of the present volume, under the title of "Uses and Profits of Land," contains the law relating to land in general, as regards the terms of description, the identification and the boundaries of property; and the general doctrines of the possessory rights and liabilities of tenants of limited estates, with special reference to the law of Waste and Repair. It then gives the application of the law to the specific products of land, namely, Timber, Crops, Minerals, Game; also to things connected with land, namely, Houses and Buildings,

vi PREFACE.

Fixtures, Title Deeds, and Heirlooms. It then gives separately the law relating to Waters, namely, Inland waters, standing and flowing; the Sea and Tidal waters; the Sea shore; and Fisheries.—The second Part, under the title of "Uses and Profits in Land of Another," contains the law of Easements, in general and in detailed application to Ways, Lights, Water, Support, and Fences; including the general law of Prescription. It treats separately the law of Profits à prendre, in application to Commons, Mining, and other profitable rights; and the law of Rents, Annuities, and the Tithe Rentcharge, with their attendant remedies, including the law of Distress.—There is added, lastly, under the title of Public Uses of land, the law of Highways and Bridges, and of Local Customary uses of land.

The several matters above specified are, for the most part, to be found treated in separate works, with fuller explanation and illustration than is here given. But it is conceived that some advantage may be offered, both to the student and to the practitioner, by treating them collectively, in due relation to one another and to the rest of the law of real property; and in this view it is hoped that the present volume will be found a useful compendium of kindred matters, which have not hitherto been presented in a collected form.

Mr. Robert Marshall Middleton, of the Inner Temple and the South-Eastern Circuit, has assisted in carrying this volume through the press, by carefully revising the proof sheets, examining and verifying the authorities, and compiling the copious index; services which have greatly improved the work in accuracy and usefulness; and which the author desires here thankfully to acknowledge.

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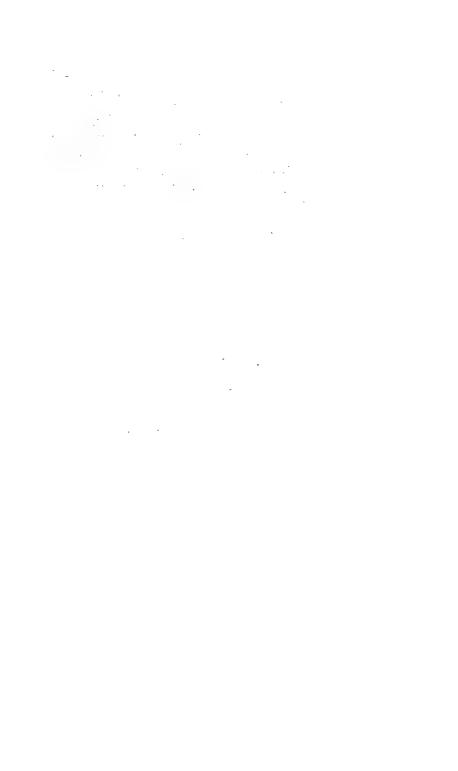
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# INTRODUCTION.

A former volume of a proposed Digest of the Law of Property in Land, after having given a short abstract of the Sources of the Law, treated of Estates in Land. An estate was there explained to be a right to the possession of land for a limited duration of time; and for the purposes of defining the various estates allowed by law, and of stating the rules regulating the limitation and order of succession of estates, land was there considered only in regard to its qualities, as a subject of property, of permanence and continuous use; being the qualities which give the power of portioning out the possession into estates or successive limited durations of time. But no consideration was there given to any complications which might arise in applying the doctrine of estates, so derived, to the specific uses and profits which in fact constitute the beneficial elements of property in land. enjoyment of land was there considered merely as flowing on unitedly and uniformly during each successive estate, and as, therefore, admitting of a substitution of ownership at any moment of time, without any difficulty in ascertaining the rights of successive owners (a).

The present volume proceeds to consider land in regard to the actual beneficial elements which make it valuable as a subject of property. Land here appears as a complex subject, having many distinct uses and profits, some of which sufficiently conform to the above abstract conditions of permanence and continuity, but others vary from them, more or less. For instance, the profit of land derived

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<sup>(</sup>a) See the Introduction to Volume I.

from the natural products of growth on the surface is more accurately described as recurrent than as continuous. With some kinds of produce, as annual crops, it is uniformly recurrent, subject only to the variations of cultivation and of the seasons; with other kinds of produce, as wood and timber, it is recurrent at longer and less regular intervals. Again, the profit of land for some purposes is neither continuous nor recurrent; as in the getting and removing of minerals and portions of the soil itself; the profit then consists in taking away the substance of the property, which can only be done once for all. Only for such purposes as require mere space can the use of land be described with perfect accuracy as uniform and permanent.

It is obvious that the principle of measuring out estates by successive intervals of limited duration, upon the assumption that the enjoyment of the subject of property is uniform and concurrent with the continuance of the estate, cannot be applied strictly to those uses and profits which fail in satisfying this assumption; and that consequently modifications are necessary to correct the irregular and uncertain distribution of the benefits which would occur, in regard to such uses and profits, upon the substitutions of ownership. A tenant for life or for years, for instance, during his tenancy might exhaust the land and its resources by working out the mines and cutting down the timber, and thus leave it permanently impoverished to his successor; or, on the other hand, he might till and sow the land, and be unable to take the crop before the expiration of his estate. It becomes necessary, therefore, in order to secure the rights of successive owners, that provision be made by law for the purpose of securing to a present tenant the fruits of proper management and cultivation, and at the same time of securing his successor against the risks of permanent waste and deterioration.

Accordingly it is now purposed to treat successively the various uses and profits of land which are recognized in law as subjects of property; and concurrently to ascertain

the quantity or degree of the uses and profits appropriated by law to different estates. The fee simple being the largest estate known to the law, and therefore including every beneficial incident allowed by law, it is purposed to consider how far the full enjoyment is modified and restricted in appropriation to the particular estates of fee tail, terms for life and for years, or other less interests in the land, and what securities are provided for the due enjoyment by each in succession. These topics occupy the first Part of the present volume under the general title of "Uses and Profits of Land."

Again, the various uses and profits of land are considered above as collectively forming one entire subject of property, united in the ownership for the time being, though subject to substitutions of ownership from time to time. But it will appear that some uses and profits are capable of being appropriated in separate ownership to one person concurrently with the possession of the same land by another person for all other purposes. In other words, the land and its possession may belong to one person, whilst at the same time some special use or profit of the land not involving possession of the land itself may be assigned in separate ownership to another person; so far infringing upon the integrity of the full ownership and enjoyment of the former. Property of this kind is exemplified by rights of way, rights to the access of light, and other like rights of use, which, under the term "Easements," one person may be entitled to enjoy over the land of another. Such also are the rights of taking from the land minerals, stone, turf, herbage, and other like profits, known in law as "Profits a prendre," which may be severed in ownership from all other uses and profits of the land and held as separate subjects of property. These rights are treated in the second Part of this volume under the title of "Uses and Profits in Land of another."

## PART I.

## USES AND PROFITS OF LAND.

- CHAPTER I. Land in general.
  - II. Possessory rights and liabilities of Tenants.
  - III. Trees, Woods, and Timber.
  - IV. Growing Crops.
    - V. Mines and Minerals.
  - VI. Game and Wild animals.
  - VII. Houses and Buildings.
  - VIII. Fixtures.
    - IX. Title-deeds and Heirlooms.
      - X. Inland waters.
    - XI. Sea and Tidal waters and Sea shore.
    - XII. Fisheries.

### CHAPTER I.

#### LAND IN GENERAL.

Terms of description—land—water—manor—messuage—appurtenants -rents, profits and uses.

Tenement—hereditament—corporeal and incorporeal—reversionary estates.

Identification of land, by name—by the occupation—by map.

Boundaries—duty of tenant to preserve—commission to ascertain copyholds-encroachments.

Property in land above and below the surface—partition of surface and sub-stratum.

Land as the subject of property, including all the beneficial uses and profits of which it is capable, may be described in conveyances, wills and legal proceedings by the general term "land"; or by terms indicating the condition of the land, as arable, meadow, pasture, wood. It may also be described by special terms referring to the legal condition of the property, as manor, honor, forest, park, warren, farm; or to the buildings upon it, as castle, hall, grange, messuage, house; or to other distinctive characteristics, as close, curtilage, garden, orchard. The terms of description are construed with reference to the context of the instrument and the circumstances to which it is applied (a).—"Water" is not in general a sufficient Water. description of the land upon which the water rests; but it may appear from the context and circumstances that it is so used and intended; the proper description is "land covered with water" (b). The term "fishery" has been held sufficient to pass the soil of a lake, where the con-

<sup>(</sup>a) Co. Lit. 4, 5; 19 b.

veyance was made by livery of seisin and with a reserva-

Manor.

Warren.

Farm.

tion of rent; both which circumstances are inapplicable to the incorporeal property in a mere right of fishery (c). -"Manor" is sufficient to pass all rights comprised in the manor designated; so that the demesne lands pass to the grantee, together with all seignorial rights, rents, services and casualties (d).—"Warren" may be taken, according to the intention of the instrument, to mean the land itself used as a warren; or it may mean merely the franchise of warren, that is, the right of taking certain wild animals in the land of another, without possession of the land itself. The term "warren of conies" has been taken to pass the soil, in accordance with the intention shewn in the deed of conveyance (e).—"Farm" primarily means land demised to a lessee, and refers to the interest of the lessor; but it may also mean the interest of the lessee (f). A devise by will of "farms" in conjunction with other real estate, upon limitations applicable to real estate only, was held not to include a leasehold farm of the testator (g).—"Close" in the ordinary sense denotes an inclosure or piece of land inclosed with boundaries; but it may from the context or circumstances receive a wider meaning (h).

Messuage or

house.

"By the grant of a messuage or house, the orchard, garden and curtilage do pass, and so an acre or more may pass by the name of a house"; but it is a question of evidence in applying the deed or instrument of conveyance, what is parcel of or appurtenant to the house (i). Appurtenant. —It is a general rule that land cannot pass under the

(c) Marshall v. Ulleswater Nav. Co., 3 B. & S. 732; 32 L. J. Q. B. 139; Holford v. Bailey, 8 Q. B. 1000; 13 Q. B. 426; Devonshire v. Pattinson, L. R. 20 Q. B. D. 263; 57 L. J. Q. B. 189.

(d) Duke of Leeds v. Powell, 1 Ves. sen. 172; Duke of Beaufort v.

Swansea, 3 Ex. 425.

(e) Rebinson v. Dultep Singh, L. R. 11 C. D. 798; 48 L. J. C. 758; Beauchamp v. Winn, L. R. 6 H. L. 236; 38 L. J. C. 556.

(f) Plowden, 195; Lane v. Stanhope, 6 T. R. 345.
(g) Holmes v. Milward, 47 L. J.

(h) Richardson v. Watson, 4 B. &

(i) Co. Lit. 5 b; 56 b; Plowden, 171; Smith v. Martin, 2 Wms. Saund. 400; Chard v. Tuck, 3 Leon. 214; Cro. Eliz. 89; Doe v. Collins, 2 T. R. 498; Doe v. Webster, 12 A. & E. 442.

mere description of an "appurtenant" of a house or land, unless it is in fact appurtenant in the sense above stated; and in that case it would pass as being included in the house or land described, without mention of appurtenants (k). But the word "appurtenant" may be used in a deed or will with reference to the context and circumstances as intending other land lying near to, or usually held or occupied with, the house or land described in the instrument; and it is then construed according to the meaning intended (l).

A grant or devise of "rents and profits" of land passes Rents, profits . the land itself (m); and a devise of "rents" may pass land, and uses. according to a common use of the word "rents" for land (n). A devise of the "income" of land is equivalent for this purpose to a devise of the rents and profits (o); and a charge upon the income of land is primâ facie a charge upon the corpus of the land (p).—A grant of "the profit" of land is sufficient to pass the land itself, "for what is the land but the profits thereof? for thereby vesture, herbage, trees, mines and all whatsoever parcel of that land doth pass." But the grant of a particular profit, as the vesture or herbage of the land, or the corn, grass, underwood and the like presumptively passes only the right of entering upon the land and taking it, and not the land itself. "So if a man grant to another to dig turves in his land and to carry them at his will and pleasure, the land shall not pass, because but part of the profit is given" (q).—"A grant of the exclusive use of land is a grant of the land" (r). So the exclusive use

<sup>(</sup>k) Co. Lit. 121 b; Buck v. Nurton, 1 B. & P. 53; Smith v. Ridgway, L. R. 1 Ex. 331; 35 L. J. Ex. 198.

<sup>(</sup>l) Plowden, 170, 171, Hill v. Grange; Thomas v. Owen, L. R. 20 Q. B. D. 225; 57 L. J. Q. B. 198; Cuthbert v. Robinson, 51 L. J.

<sup>(</sup>m) Doe v. Lakeman, 2 B. & Ad. 42; Johnson v. Johnson, 56 L. J. C.

<sup>326;</sup> L. R. 35 C. D. 345.

<sup>(</sup>n) Kerry v. Derrick, Cro. Jac.

<sup>(</sup>o) Mannox v. Greener, L. R. 14 Eq. 456.

<sup>(</sup>p) Wormald v. Muzeen, L. R. 17 C. D. 167; 50 L. J. C. 776; and see ante, vol. i. p. 274.

(q) Co. Lit. 4 b.

<sup>(</sup>r) Per cur. Capel v. Buszard, 6

Bing. 159.

of land for all purposes to which the land is in fact applicable, is presumptive evidence of the entire ownership; as in the case of an exclusive pasturage of sheep upon a mountain sheep walk, upon which no other act of ownership had been exercised (s).

Tenement.

The term "tenement" means primarily whatever may be the subject of tenure; "it includes, not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or annexed to or exerciseable within the same, though they lie not in tenure; as rents, commons, or other profits whatsoever granted out of land" (t). It is used as including separate profits granted out of land in the Statute De Donis; all such profits are within the statute and may be entailed, as a right of hunting and taking game (u). It is used in a similar meaning in the Statute of Frauds, s. 5, prescribing the form of wills (v); also in the Settlement Acts, as a right of pasturing cattle (w), or a right of warren (x); and in the Acts relating to the qualification of parliamentary electors, as the tolls of a bridge or ferry (y). —The word "tenement" is also used in a popular sense for a dwelling house or building, and may be so taken in construing Acts of Parliament (z).

Hereditament.

"An hereditament is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal or mixed" (a).—

(s) Jones v. Richard, 5 A. & E.

(t) Co. Lit. 6 a; 19 b; Dawson v. Robins, L. R. 2 C. P. D. 38; 46 L. J. C. P. 62.

(u) Co. Lit. 19 b; Moore v. Plymouth, 7 Taunt. 614.

(v) Habergham v. Vincent, 2 Ves. jun. 232.

(w) The King v. Tolpuddle, 4 T. R. 671.

(x) The King v. Piddletrenthide, 3 T. R. 772; Beauchamp v. Winn,

L. R. 6 H. L. 242; 38 L. J. C. 556.

(y) Wadmore v. Dear, L. R. 7 C. P. 224; 41 L. J. C. P. 49. (z) Dashvood v. Ayles, L. R. 16 Q. B. D. 301; 55 L. J. Q. B. 8; I orkshire Ins. Co. v. Clayton, L. R. 8 Q. B. D. 423; 51 L. J. Q. B. 82.

(a) Lit. s. 9; Co. Lit. 6 a; Lloyd v. Jones, 6 C. B. 81; Cockburn, C. J. The Queen v. Cambrian Ry., L. R. 6 Q. B. 427; 40 L. J. Q.

B. 169.

Things are distinguished as corporeal and incorporeal according as they are capable or incapable of actual possession. The corporeal include land itself and all parts of land that are capable of separate possession, as the surface and substratum. The incorporeal include all uses and profits of land which may be held and enjoyed as separate subjects of property, while the land itself remains in the possession of another. "Incorporeal hereditaments are principally advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities and rents " (b).

The terms lands, tenements, hereditaments, and other Reversionary general words descriptive of the subject of property, serve also to pass all estates and interests in the property so described, whether in possession or reversion. Thus by a grant of "lands and tenements," a reversion or remainder which the grantor has in land, or in rent issuing out of land, will pass. So, "if a man has a reversion in a mill and grants 'all his mill,' the reversion will pass." "And if land, be known by the name of a house, then the reversion of the same land may pass by the name of the house. And if six acres are known by the name of a manor, then the reversion of them may pass by the name of the manor", (c).

Land is usually identified in a deed or instrument by Identification the proper name, by which it is known. There is no ex-of land. clusive property in the use of a name for a house or land; Name. nor are there any means of preventing the mere use of the same name by others (d). The naming of streets and numbering of houses in the metropolis is regulated by the provisions of the Metropolis Local Management Act, giving authority for that purpose to the Metropolitan Board of Works (e).—Land is sometimes described by reference to Occupation.

<sup>(</sup>b) 2 Blackst. Com. 20.(c) Perkins, ss. 114, 116, 540.

<sup>(</sup>d) Day v. Brownrigg, L. R. 10 C. D. 294; 48 L. J. C. 173. (e) 18 & 19 Vict. c. 120, s. 141.

the occupation, as having been lately or being now in the occupation of a certain named person; such descriptions are taken generally as intended for the purpose of identifying the property only, and not of limiting or extending the operation of the instrument (f).—Land may be more exactly identified by setting out the abuttals or boundaries; and this in modern conveyances is usually done by reference to a map or plan with a schedule of the parcels annexed to the deed or instrument (q).

Мар.

Boundaries.

The boundaries of adjacent properties, as between independent owners, are protected by the ordinary legal remedies against adverse entry and possession, and for the recovery of land. There is no special obligation upon such owners, and no special jurisdiction of the Court in regard to the boundaries. "The Court will not interfere between independent proprietors and force one of them to have his rights tried and determined in any other way than the ordinary legal mode. Confusion of boundaries furnishes, per se, no ground for the interposition of the Court" (h). But in certain relations of adjacent owners there arises a special obligation to preserve the boundary; as in that of landlord and tenant. "A tenant contracts among other obligations resulting from that relation, to keep distinct from his own property during his tenancy, and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own "(i). obligation is enforced by a special jurisdiction of the Court to issue a commission to ascertain the boundaries if possible; and if it be found impossible, to set out so

Duty of tenant.

Commission to ascertain boundaries.

<sup>(</sup>f) Martyr v. Lawrence, 2 D. J. & S. 261; Doe v. Burt, 1 T. R. 701.

<sup>(</sup>g) Llewellyn v. Jersey, 11 M. & W. 183; Barton v. Dawes, 10 C. B. 261; Squire v. Campbell, 1 M. & Cr. 478; Willis v. Watney, 51 L. J. C. 181.

<sup>(</sup>h) Eldon, L. C. Speer v. Crawter, 2 Mer. 417; Miller v. Warmington, 1 J. & W. 492; Bute v. Glamorgan Canal, 1 Phill. 684. As to fencing boundaries, see post, p. 253.

(i) Eldon, L. C. A.-G. v. Fuller-

<sup>(</sup>i) Eldon, L. C. A.-G. v. Fullerton, 2 V. & B. 264; Spike v. Harding, L. R. 7 C. D. 871; 47 L. J. C. 323.

much of the tenant's own land as shall be equal in value to that originally granted or leased (j). By consent of the parties the Court will direct an inquiry in chambers to ascertain the boundaries; and the Court will grant discovery and inspection of documents in aid of the jurisdiction (k). "The relief is founded on misconduct analogous to a breach of trust. If the person having such particular interest suffers the boundaries to be confused, so that the reversioner or remainderman cannot tell to what land he is entitled, the Court will give relief by compelling the person who has occasioned the difficulty to make good, out of that which may be considered a common fund, that portion of it which belongs to another" (1). The obligation runs with the land, and the relief is given not only against the person guilty of the neglect, but against all those who claim under him, either as volunteers or purchasers. But in order to claim the relief it is essential to establish by admission or by evidence that the party charged in fact possesses the land lost by confusion of boundaries. It is not sufficient to show that he has acquired and holds a part of the estate with which it has been confused, without showing that the part which he holds contains the part which is lost (m).

—The same obligation exists in copyhold tenure. The Tenant of copyholder who holds freehold land of the same manor is bound to keep the boundaries distinct, and in case of confusion, the lord is entitled to have a commission to ascertain the boundaries, or to set out as much of the freehold as is of equal value with the copyhold lost. "The confusion of boundaries does not infer any negligence on the part of the lord; for the tenant is in possession of the land" (n).

land (n).

<sup>(</sup>j) Speer v. Crawter, 2 Mer. 418; Willis v. Parkinson, 2 Mer. 507; 1 Swanst. 9.

<sup>(</sup>k) Brown v. Wales, L. R. 15 Eq. 142; 42 L. J. C. 45; Spike v. Harding, supra.

<sup>(</sup>l) Cranworth, L. C. A.-G. v. Stephens, 6 D. M. & G. 133; 25

L. J. C. 890.

<sup>(</sup>m) A.-G. v. Stephens, supra; Godfrey v. Little, 2 Russ. & M. 630.

<sup>(</sup>n) Leeds v. Strafford, 4 Ves. 180; See North v. Strafford, 3 P. Wms. 150; see Leeds v. Powell, 1 Ves. sen. 172.

Encroachments.

It is a general rule that an encroachment made by a tenant advancing the boundary over adjoining land is presumed to be an accretion to the demised land, which must be given up to the landlord at the end of the term (o). Consequently the Statute of Limitations has no application against the landlord during the continuance of the tenancy (p). The doctrine applies equally whether the encroachment is made upon other land of the lessor or upon land of a third party (q). And it applies to land which the tenant is enabled to take possession of by virtue of his position of tenant, though not strictly adjoining to the boundaries of the demised land: as land separated merely by a road or stream, or an inclosure from an adjacent waste or common (r). Upon the same principle it was held that where a copyholder extended his tenement by an encroachment upon the adjoining waste of the manor, there being a custom in the manor for the lord to grant waste as copyhold, the encroachment was an accretion to the original copyhold; the presumption being in favour of a legal title, and of that most favourable to the lord (s). But where the lord took a surrender and made a re-grant of the original tenement without the accretion, it was held that he had precluded himself from claiming it (t).

Encroachment by copyholder on waste.

> Property in land as defined and limited by superficial boundaries presumptively carries with it everything contained beneath the surface, as mines and minerals, also the space above the surface with whatever use can be made of it (u). Therefore, if an owner of land build anything

Property in land above and below the surface.

(11) Co. Lit. 4 a.

<sup>(</sup>o) Bryan v. Winwood, 1 Taunt. 208; Doe v. Jones, 15 M. & W. 580; Lisburne v. Davies, L. R. 1 C. P. 259; 35 L. J. C. P. 193. (p) Whitmore v. Humphries, L. R.

<sup>7</sup> C. P. 1; 41 L. J. C. P. 43. (q) Andrews v. Hailes, 2 E. & B.

<sup>(</sup>r) Andrews v. Hailes; Lisburne v. Davies, supra.

<sup>(</sup>s) A.-G. v. Tomline, L. R. 5 C. D. 750; 46 L. J. C. 654. (t) S. C. on appeal, L. R. 15 C. D. 150; in which case the Court of Appeal thought it doubtful whether the doctrine of encroachment by a tenant operating for the benefit of the landlord applied at all to copyhold tenure.

projecting over the boundary, as the cornice or eaves of a house, it is primâ facie wrongful to the owner of the adjoining land, by encroaching upon his space and preventing him from building above the level of the projection. The remedy of the latter is either by himself abating the nuisance, or by bringing an action for damages and for an injunction to remove it; and in such action the encroachment imports in law a nominal damage, without allegation or proof of any special damage arising from it (x).—By the right of abating a nuisance the owner of a close can justify cutting off the branches of trees which grow over the boundary from the adjacent land; and in a case where a person had turned a horse into his field, which was poisoned and died in consequence of eating branches of yew growing over the boundary, it was held that he might recover the loss from the owner of the trees (y). Upon the same principle the owner of a house or land may prevent the carrying of telegraph wires through the air over his property (z).

Land may be divided into separate properties by hori- Partition of zontal as well as vertical partition, and the surface and the land horizontally. strata beneath the surface may be appropriated and held as separate tenements, as in the case of mines and minerals held in separate ownership. Upon this principle a house may be divided into flats and let in separate tenements, which for all ordinary legal purposes may be regarded as separate houses (a).—Under the Lands Clauses Consolida- Lands Clauses tion Act, 1845, 8 & 9 Vict. c. 18, which provides for rail- Act. way and other companies acquiring land for the purposes of their undertakings, the word "land" is taken in the ordinary sense as including the whole space above and

<sup>(</sup>x) Baten's Case, 9 Co. 53 b; Fay v. Frentice, 1 C. B. 828; Harris v. De Pinna, L. R. 33 C. D. 260; 56 L. J. C. 348.

<sup>(</sup>y) Crowhurst v. Amersham Burial Board, L. R. 4 Ex. D. 5; 48 L. J. Ex. 109.

<sup>(</sup>z) Wandsworth v. United Tele-phone Co., L. R. 13 Q. B. D. 904; 53 L. J. Q. B. 449.

 <sup>(</sup>a) Yorkshire Ins. Co. v. Clayton,
 L. R. 8 Q. B. D. 421; 51 L. J. Q. B. 82. As to mines and minerals, see post, p. 51.

Superfluous land. below the surface; and a railway company, although requiring only a portion of such space for the purpose of a tunnel or a bridge, are bound to take the whole; also, having taken it, the space not required for the tunnel or bridge does not become "superfluous land," which the company is directed by the Act, s. 127, to sell (b). But the company's special Act may give the power of making only a tunnel through the land or a bridge over it, without taking the space above and below (c).

(b) Re Metropolitan District Ry. and Cosh, L. R. 13 C. D. 607; 49 L. J. C. 277; Pinchin v. Blackwall Ry., 5 D. M. & G. 861; 24 L. J. C. 417; Mulliner v. Midland Ry., L. R. 11 C. D. 611; 48 L. J. C. 258; Ware v. London and Brighton Ry., 52 L. J. C. 198.

(c) Hill v. Midland Ry., L. R. 21 C. D. 143; 51 L. J. C. 774; Great Western Ry. v. Swindon Ry., L. R. 9 Ap. Ca. 787.

#### CHAPTER II.

### POSSESSORY RIGHTS AND LIABILITIES OF TENANTS.

Tenant in fee simple—fee subject to executory interests—equitable waste.

Tenant in tail-special tail-after possibility of issue extinct-under Settled Land Act.

Tenant for life or for years—liability for waste.

Action of waste-damages-limitation of action-action of waste by or against executor-waste by stranger-vis major.

Tenant for life or years without impeachment of waste-equitable waste-covenants relating to use of land demised-implied contract of tenant.

Tenant at will—tenant of copyhold—waste by copyholder.

Tenants of equitable estates—special trusts.

Tenant in fee simple absolute, in possession, has the largest Tenant in fee right to the uses and profits of the land that is allowed simple. by law. He may cut timber and any other trees, open and work mines and take soil and minerals, build and pull down houses, as he pleases; by right of absolute ownership he may commit waste and destruction of the inheritance (a). -Tenant in fee simple, subject to an executory use or Fee subject to devise, has all the legal rights and incidents of a fee executory interests. simple; but the Court will protect the future interest so far as to restrain the tenant in possession from such exercise of his strict legal rights as would unduly prejudice the future possession. Though he would as tenant in fee simple be entitled to cut and take all timber and other trees, he would be restrained from cutting such timber as is not ripe for cutting, and such timber and other trees as

<sup>(</sup>a) Duke of Norfolk v. Arbuthnot, L. R. 4 C. P. D. 306; 48 L. J. C. P. 745.

are ornamental to the estate. He would also be restrained generally from acts of mere wilful destruction (b). Such an injunction was granted against a tenant in fee subject to an executory devise in the event of his leaving no issue at his death; also against a tenant in fee subject to an executory devise to take effect upon his death under twenty-one; in accordance with the presumed intention of the testator in such cases that the estate should pass over to the future devisee without material deterioration (c).—The wilful waste and deterioration of the property which is thus restrained in the interest of the successor, though not actionable at common law, is technically known as "equitable waste."

Equitable waste.

Tenant in tail.

subject to executory devise.

by tenant in tail.

Tenant in tail in possession has all uses and profits of the land, as fully as tenant in fee simple absolute. may cut timber, open mines, pull down houses, as he pleases, without being impeachable for waste or destruc-Tenant in tail tion. For a tenant in tail by taking proper proceedings for barring the entail has the power of acquiring to himself a fee simple absolute, discharged of all remainders and reversions, and of all executory interests that may be limited to take effect in defeasance of the estate tail. in right of his capacity of acquiring such enlarged estate, he can exercise the same rights of use and enjoyment as if he had acquired it. He has, in this respect, fuller dominion over the land than tenant in fee simple; inasmuch as the latter cannot discharge his estate from executory limitations, and therefore in exercising his rights of Sale of timber ownership, he is bound to respect them (d). But though tenant in tail in possession is not impeachable for waste, and may take any profits from the land, as trees or minerals, and sell them and take the proceeds, yet he cannot effectually convey them before taken without barring the

<sup>(</sup>b) Turner v. Wright, Johns. 740; 29 L. J. C. 598.

<sup>(</sup>c) Ib.; Robinson v. Litton, 3 Atk.

<sup>(</sup>d) .Inte, p. 15; A.-G. v. Duke of Marlborough, 3 Madd. 498; Mild-may's Case, 6 Co. 41 a.

entail. If he conveys them by an ordinary deed, not operating in bar of the entail, and they are not taken during his life, the property in them descends with the estate to the heir in tail, and the purchaser has no longer any claim. A tenant in tail in possession may authorise another to cut trees or to take minerals; but such authority conveys no interest until executed, and is determined by his death (c). -Tenants of estates entailed in perpetuity without power Perpetual of barring the entail, which is the case of estates tail with reversion in the Crown, and of certain estates tail that have been settled inalienably by Act of Parliament, have the same absolute rights and are not restrainable even from equitable waste (f).—An infant tenant in tail, though incapacitated generally from alienation, has similar rights, and cannot be restrained from taking timber, minerals, or other profits (q).

Tenant in special tail is in the same position as regards Tenant in possessory rights as a tenant in tail general.—Tenant in possessory rights as a tenant in tail general.—Tenant in after possibi-special tail "after possibility of issue extinct" is in the lity of issue position of a tenant for life only, in that the estate tail extinct. must terminate at his death, nor can he enlarge it into a fee simple; but he retains the privilege incident to the estate tail of not being impeachable for waste at law. Courts of equity regarding him merely as a tenant for life without impeachment of waste restrain him from committing equitable waste. A tenant in this position may cut timber and take the timber when cut for his own use, provided the cutting is not equitable waste (h). - By the Settled Settled Land Land Act, 1882, 45 & 46 Vict. c. 38, ss. 3, 58, a tenant in Act. tail, and a tenant in tail after possibility of issue extinct, in possession, have the powers of a tenant for life under the Act, enabling them to sell the settled land or any part

15 Ves. 428.

<sup>(</sup>e) Cholmeley v. Paxton, 3 Bing. 211; S. C., Cockerell v. Cholmeley, 10 B. & C. 564.

<sup>(</sup>f) A.-G. v. Duke of Marl-borough, 3 Madd. 498.

<sup>(</sup>g) Wigram, V.-C. Ferrand v.

Wilson, 4 Hare, 374. (h) Lit. ss. 32, 33; Co. Lit. 27 b; Bowles' Case, 11 Co. 79; A.-G. v. Duke of Marlborough, 3 Madd. 538; Williams v. Williams, 12 East, 209;

thereof, or any right or privilege over the same; subject to the provisions of the Act as to the proceeds.

Tenant for life or for years.

Waste.

Tenant for life or for years, in possession, has all the ordinary uses and profits that accrue continuously, or periodically, or occasionally from time to time, during the term; but he has no right of taking or destroying anything that is permanent and part of the inheritance, as trees, soil, minerals, or houses and buildings, and he is, in general, impeachable for "waste" or destruction (i).— Waste is described as of two kinds, namely, "voluntary or actual, and permissive." The former consists in acts of wilful destruction, as cutting down trees, pulling down houses and the like. Permissive waste is caused by negligence only, as by suffering houses to be uncovered whereby the rafters or other timbers of the house are rotten; or by suffering walls of the sea or rivers to be in decay, whereby the land is overflowed and unprofitable (j). "No act can be waste which is not injurious to the inheritance"; and an act may be injurious and actionable "either, first, by diminishing the value of the estate, or, secondly, by increasing the burthen upon it, or, thirdly, by impairing the evidence of title" (k). Accordingly such acts as ploughing up ancient meadow and removing fences are prima facie acts of waste, and are actionable (1). -Waste can only be committed of the land demised: therefore where trees were excepted from a lease, it was held that cutting the trees was not technically waste. upon which a forfeiture could be claimed, though it might be a trespass upon the possession of the trees (m).

<sup>(</sup>i) Herlakenden's Case, 4 Co. 62b; Liford's Case, 11 Co. 48 a; Bowles' Case, 11 Co. 81 b.

<sup>(</sup>j) Co. Lit. 53 a. See post, p. 92. (k) Per cur. Doe v. Burlington, 5 B. & Ad. 517; Young v. Spencer, 10 B. & C. 145; Huntley v. Russell, 13 Q. B. 572. Jessel, M. R. Jones v. Chappell, L. R. 20 Eq. 541; 44

L. J. C. 658.

<sup>(</sup>l) Co. Lit. 53 b; Greene v. Cole, 2 Wms. Saund. 259, n. (11); Simmons v. Norton, 7 Bing. 640; St.
Albans v. Skipwith, 8 Beav. 354.
(m) Goodright v. Vivian, 8 East,
190; see Bullen v. Denning, 5 B. &

C. 842.

The action for waste at common law lay against tenant Action of in dower, tenant by the curtesy, and guardian, the tenancy waste. in these cases being created by the law; but no action lay against lessee for life, or for years, or at will, because they came in by the act of the lessor, and, it was said, he might have provided against waste in the lease. The waste, however, though not actionable, did not change the property in the trees or minerals wasted, which remained in the lessor (n).—The action was extended to tenants for life and for years by the Statute of Marlbridge, 52 Hen. 3, c. 23, enacting that "fermors, during their terms, shall not make waste sale nor exile of houses woods nor of anything belonging to the tenements that they have to ferm, without special licence had by writing of covenant making mention that they may do it." The term "fermors" comprehends all such as hold by lease for life or lives or for years, by deed or without deed. Tenant at will was not affected by the statute and remained as at common law (o).—A special action was given by the Statute of Gloucester, 6 Edw. I., c. 5, for the recovery of the place wasted and treble damages. This action, in common with other real actions, was abolished by the statute 3 & 4 Will. IV., c. 27, s. 36; leaving the common law remedy by an action for damages, which was extended to tenants for life and for years by the above-mentioned Statute of Marlbridge (p). Accordingly an action may now be brought to recover damages for waste against the tenant for life or for years, by the person having the immediate vested estate in reversion or remainder, for life or for years, in fee or in tail; and such person may recover damages for the waste done, which is assessed according to his interest in the property (q).—An injunction may be

<sup>(</sup>n) 2 Co. Inst. 299; 4 Co. 62 b, Herlakenden's Case; Bowles' Case, 11

<sup>(</sup>o) 2 Inst. 144, 299. (p) 2 Wms. Saund. 252 a, Greene v. Cole; Parke, B., Harnett v.

Maitland, 16 M. & W. 262; per cur. Woodhouse v. Walker, L. R. 5 Q. B. D. 406; 49 L. J. Q. B. 611. (q) Co. Lit. 53a; 2 Wms. Saund. 252 a; see Perrot v. Perrot, 3 Atk. 94; Bacon v. Smith, 1 Q. B. 345.

Damages.

claimed against continued or threatened waste (r); also a claim may be made for an account of the proceeds of waste, as the proceeds of timber wrongfully cut or of minerals wrongfully taken (s).—The measure of damages is the diminished present value of the reversion, and not the cost of restoring the property to its unwasted condition (t). In cases of merely nominal damage it was the practice of the Courts of common law to enter the judgment for the defendant, in order to avoid the consequence under the Statute of Gloucester, of forfeiture and treble damages (u). Accordingly it is said: "The waste must be something considerable; for if it amount only to twelvepence or some such petty sum, the plaintiff shall not recover in an action of waste: nam de minimis non curat lex" (v). "Trees to the value of three shillings and fourpence hath been adjudged waste; and many things together may make waste to a value" (w). Upon this principle the Court will not grant an injunction unless the waste charged is "of a substantially injurious character; and if the waste be really ameliorating waste, which results in benefit and not in injury, or if it be so small as to be indifferent, the Court will not interfere to prevent it "(x). The limit of actionable waste is sometimes fixed in value by agreement in the lease (y).—Waste is actionable immediately it is committed, without waiting till the end of the tenancy; although possibly the waste might be repaired and the land restored by the tenant during his tenancy (z). Consequently the Statute of Limitations runs from the time of committing the waste, whether the claim be made

Limitation of action.

<sup>(</sup>r) Perrot v. Perrot, 3 Atk. 94; Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25 (8).

<sup>(</sup>s) Bp. Winchester v. Knight, 1 P. Wms. 406; Higginbotham v. Hawkins, L. R. 7 Ch. 679; 41 L. J. C. 828.

<sup>(</sup>t) Whitham v. Kershaw, L. R. 16 Q. B. D. 613.

<sup>(</sup>u) Harrow School v. Alderton, 2 B. & P. 86; per cur., Pindar v.

Wadsworth, 2 East, 164.

<sup>(</sup>v) 3 Blackst. Com. 228. (w) Co. Lit. 54 a.

<sup>(</sup>x) Doherty v. Allman, L. R. 3 Ap. Ca. 721; Bubb v. Felverton, L. R. 10 Eq. 465; 40 L. J. C. 38; Mollineux v. Powell, 3 P. Wms. 268, n.

<sup>(</sup>y) Doe v. Bond, 5 B. & C. 855. (z) Queen's Coll. v. Hallett, 14 East, 489.

for damages, or for an account of the proceeds of the waste (a). But waste in non-repairing under a special obligation to repair may be a continuing cause of action until the end of the tenancy (b).

The action of waste by the rule of common law died with the person, either of the reversioner of the land wasted or of the tenant who committed the waste; so that "the heir of the reversioner cannot recover damages for the waste done in the life of the ancestor" (c). But by statute Action by 3 & 4 Will. IV. c. 42, s. 2, "An action may be maintained executor." by the executor or administrator of any person deceased, for any injury to the real estate of such person committed in his lifetime for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages when recovered shall be part of the personal estate of such person."-By the same statute, Action sect. 2, an action for waste, committed by the deceased cutor of detenant in his lifetime, may be maintained against his ceased tenant. executors and administrators, "so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate of such person." If the action of waste to recover damages for the injury to the reversion be barred by the death of the tenant, no claim can be made against his estate in respect of indirect profit derived from the waste, as the saving of expense by not repairing a house, or the gain of ploughing up meadow land; but an action may be brought to recover property, or the proceeds

<sup>(</sup>a) Seagram v. Knight, L. R. 2 Ch. 628; 36 L. J. C. 310; Higgin-botham v. Hawkins, L. R. 7 C. 676; 41 L. J. C. 828.

<sup>(</sup>b) Woodhouse v. Walker, L. R. 5 Q. B. D. 404; 49 L. J. Q. B. 609.

<sup>(</sup>c) 2 Inst. 305.

or value of property, actually acquired to the estate of the deceased tenant, as timber cut and minerals got and sold by him(d). Waste in non-repairing under a liability to repair gives a continuing cause of action de die in diem up to the day of the death of the tenant; and an action may be brought for it within the six months after the taking out of administration (e).

Waste by stranger. The tenant is responsible for acts of waste committed by a stranger, though without his knowledge or consent; for it is his duty to protect the property, and he can, at least, recover full damages for the injury to his possessory right. "It is presumed in law that he may withstand it, et qui non obstat quod obstare potest facere videtur" (f).—But the tenant is not responsible for waste and destruction caused by superior force (vis major) which he is not able to prevent and against which he has no remedy, and which he has not covenanted to answer for; as waste done by tempest, lightning, or the like; or by the enemies of the king (g).

Vis major.

Tenant
"without
impeachment
of waste."

The Statute of Marlbridge above cited prohibited tenants for life and for years from making waste, "without special licence had by writing of covenant making mention that they may do it." The "special licence" of the statute may be given by the usual phrase "without impeachment of waste," or an equivalent phrase, appended to the limitation of the estate (h). "The addition, without impeachment of waste, is an addition of interest; and it may be general or under such restrictions as the settlor thinks fit." Thus a tenancy for life may be subject to impeachment of waste, except in cutting down timber for repairs, or timber going to decay or injurious to other

<sup>(</sup>d) Bp. Winchester v. Knight, 1 P. Wms. 406; Phillips v. Homfray, L. R. 24 C. D. 439; 52 L. J. C. 836.

<sup>(</sup>e) Woodhouse v. Walker, L. R. 5 Q. B. D. 404; 49 L. J. Q. B. 609. (f) 2 Inst. 146, 303; \_1ttersoll

v. Stevens, 1 Taunt. 183; 2 Wms. Saund. 259 d (t).

<sup>(</sup>g) 2 Inst. 302; Co. Lit. 53 b, 283 a; see post, p. 96.
(h) 2 Inst. 146; per cur. Wood-

<sup>(</sup>h) 2 Inst. 146; per cur. Woodhouse v. Walker, L. R. 5 Q. B. D. 407; 49 L. J. Q. B. 609.

trees; and a lease may be made of a house and land "without impeachment of waste in the house" (i). In leases granted under powers the licence to commit waste is restricted by the limits of the power; and the lease must conform to the power in this respect. Under a power to grant leases such that the lessee shall not be made dispunishable for waste, a lease in which the lessor covenanted to repair was construed as exempting the lessee from waste to the extent of the repairs by the lessor, which being in excess of the power rendered the lease void (k). A lease made "without impeachment of waste, excepting voluntary waste," was held to leave the tenant liable for wilful waste, and to give him no further right or interest in the timber than an ordinary tenant for life (1). phrase "without impeachment of waste by any action," or "without being impleaded for waste," is construed as excepting only the liability to an action for the waste, but without affecting the property in the waste committed, as in trees cut down, which remain the property of the lessor. Such words bar the lessor of his action for damages, but not of his property (m).

Tenant for life or for years, without impeachment of Rights of waste has all the rights of use and profit of tenant in fee tenant without impeachsimple. He may cut down timber or dig minerals during ment of waste. his term and sell them, and appropriate the proceeds to his own use. But he has a power only, which will produce an interest in him, if he executes it or gives authority to another to do so, during the continuance of his estate; but such power and authority ceases with his estate (n). Where

<sup>(</sup>i) Per cur. Pigot v. Bullock, 1 Ves. jun. 483; Aston v. Aston, 1 Ves. sen. 265; Co. Lit. 54b;

Toaker v. Annesley, 5 Sim. 235.
(k) Yellowly v. Gower, 11 Ex. 274; 24 L. J. Ex. 289; Doe v. Bettison, 12 East, 305; see Davies v. Davies, L. R. 38 C. D. 499; post,

<sup>(</sup>l) Garth v. Cotton, 1 Ves. sen. 524; 1 W. & T. L. C. 641, 3rd

ed.; but see Vincent v. Spicer, 22 Beav. 380; 25 L. J. C. 589. (m) 11 Co. 82 b, Bowles' Case.

See ante, p. 19.

<sup>(</sup>n) Per cur. Bowles' Case, 11 Co. 82b; Heath, J. Attersoll v. Stevens, 1 Taunt. 198; Gent v. Harrison, Johns. 577; 29 L. J. C. 70; Cholmeley v. Paxton, 3 Bing. 207; S. C. Cockerell v. Cholmeley, 10 B. & C. 564, cited ante, p. 17.

trustees, in exercise of a general power of sale sold the land, excepting the timber, and the tenant for life impeachable of waste sold the timber valued separately to the same purchaser and received the purchase-money, it was held that the sale was void; for the trustees had no power to sell the land without the timber, and though the tenant for life might cut all the timber during his life, yet he had no power to sell the timber standing (o). Where tenant for life without impeachment of waste, under a power to sell with consent of trustees and with trust for reinvestment, sold the estate with the timber upon it, it was held that the tenant for life was not entitled to the proceeds of the timber, because it was sold under the power and not in his own right (p). So where tenant for life with power to cut. certain timber sold the settled land under the Settled Land Act, it was held that he was not entitled to the value of the timber; but that it must be treated as capital money under sect. 21 of the statute (q). Tenant for life "without impeachment for waste," like a tenant in fee simple subject to executory limitations, is restrained from the committing of "equitable waste;" for it is considered in equity that where land is settled for estates for life and in remainder, the intention must be that the land should be substantially preserved and delivered over to the successive tenants in its integrity. Therefore while a tenant in possession of an estate "without impeachment of waste" is allowed his legal rights to the extent of taking all reasonable use and profit from the land, he is restrained from unreasonable destruction of the settled property to the disappointment of the future objects of the settlement (r). By the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25 (3), "an estate

Equitable waste.

Waste under Judicature Act.

<sup>(</sup>o) Cholmeley v. Paxton, 3 Bing. 207; Cockerell v. Cholmeley, 10 B. & C. 564; 1 Russ. & M. 424; 1 Cl. & F. 61.

<sup>(</sup>p) Doran v. Wiltshire, 3 Swanst.

<sup>(</sup>q) Re Llewellin, L. R. 37 C. D. 317; 57 L. J. C. 316.

<sup>(</sup>r) Vane v. Barnard, 2 Vern. 738; L. Hardwicke, L. C. Aston v. Aston, 1 Ves. sen. 264; Garth v. Cotton, 1 W. & T. L. C. 674, 3rd ed.

for life without impeachment of waste shall not confer, or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

The general liability of a tenant for waste may also be Covenants modified, and may be wholly superseded by the express and agreements as to covenants and conditions of the lease respecting the mode use of land. of using the demised premises (s). If the lessee covenants merely against waste, that is, to the same effect as the common law liability for waste, the remedy by action of waste is retained, notwithstanding the covenant; but if the covenant varies the liability the remedy lies upon the covenant (t).—In the absence of express covenant there is Implied implied in law, for the convenience of remedy, a contract contract of tenant. or obligation on the part of the lessee, to use the demised premises in a tenant-like manner, relatively to the nature of the premises; but which is nothing more in substance than the obligation concerning waste arising from the mere relation of landlord and tenant (u). No such contract is implied where the tenant holds under an express contract providing for the same matter (v).

Tenant at will has the possession of the land, and all Tenant at the uses and profits that are incident to mere possession; but he is liable for acts of waste, in cutting down trees or in pulling down houses or the like, as substantive tres-"For when tenant at will takes upon him to do such things which none can do but the owner of the land. these amount to the determination of the will and of his possession, and the lessor shall have a general action of trespass without any entry." An action of waste would not

<sup>(</sup>s) Jones v. Hill, 7 Taunt. 392. (t) Kinlyside v. Thornton, 2 W. Bl. 1111; Jones v. Hill, 7 Taunt. 392; Marker v. Kenrick, 13 C. B. 188; 22 L. J. C. P. 129.

<sup>(</sup>u) Powley v. Walker, 5 T. R. 373; Dietrichsen v. Gräbelei, 14 M. & W. 850.

<sup>(</sup>v) Standen v. Chrismas, 10 Q. B. 141; Jones v. Hill, 7 Taunt. 392.

lie against tenant at will, either at common law or under the statutes which gave the action of waste against tenant for life and tenant for years (w).

Tenant of copyhold.

A copyholder, or tenant at will of the lord according to the custom of the manor, has the uses and profits that are attendant on the possession of a tenant at will, the land for all other purposes remaining the property of the lord. The lord's rights are subject to the possessory rights of the tenant, and therefore the lord cannot enter to cut timber or to take minerals or to exercise any proprietary rights, without the consent of the tenant. An entry of the lord for such purposes, during the continuance of the · copyholder's tenancy and without his leave, would be an act of trespass. But by special custom in some manors the lord or the tenant may be entitled to timber or minerals absolutely and immediately (x).—Voluntary or wilful waste by a copyholder determines the will and is a forfeiture of the tenancy (y). The lord-has no remedy against a copyhold tenant by action of waste, and therefore must proceed for the forfeiture; but in cases where forfeiture is an inadequate remedy he may obtain an injunction, as where the chief value of the land is in the timber or minerals wasted (z); and he may recover the proceeds of the waste (a).

Waste by copyholder.

Equitable tenancies.

A tenant in possession under an equitable title has the same possessory rights and liabilities as a tenant of the corresponding legal estate, whether his estate be in fee or for life or for years; and the tenant for a limited estate for life or years is equally impeachable for waste, unless

(a) \_1nte, p. 20.

<sup>(</sup>w) Ante, p. 19; Lit. s. 71; Co. Lit. 57 a; Countess of Shrews-Co. Lit. 37 a; Counters by Shrewsbury's Case, Cro. Eliz. 777; 5 Co. 13 b; Gibson v. Wells, 1 B. & P. N. R. 290; Harnett v. Maitland, 16 M. & W. 257.

(x) Heydon v. Smith, 13 Co. 67;

Dench v. Bampton, 4 Ves. 700; Eardley v. Granrille, 45 L. J. C. 669; L. R. 3 C. D. 826; Att.-Gen.

v. Tomline, L. R. 5 C. D. 750; 46 L. J. C. 654.

<sup>(</sup>y) Scriven on Cop. 442, 4th ed.;
Doe v. Burlington, 5 B. & Ad. 507.
(z) Eldon, L. C., Richards v.
Noble, 3 Mer. 673, overruling
Loughborough, L. C., Dench v.
Bampton, 4 Ves. 706; Parrott v.
Palmer, 3 M. & K. 639.

expressly licensed to be unimpeachable (a). Under the old Judicature system of distributed jurisdiction between Courts of law Acts. and equity, the trustee having the legal title was considered as the owner at common law and might have an action of ejectment to recover the possession even from the cestui que trust, who was considered as a stranger to the land and had no legal remedy in his own name; but the Court of Chancery protected the possession of the latter by granting an injunction against ejectment, and by making the trustee accountable for all profits received by him (b). Under the new system of the Judicature Acts, the legal and equitable titles are equally recognized in all the divisions of the High Court of Justice as the circumstances may require; and the beneficial title prevails according to the principles of equity (c).

Special or active trusts to receive and apply the profits Active trusts. of land, to raise money-charges, and for sale and conversion, may require the trustee or legal owner to retain the possession of the land in order to carry out the trusts and purposes declared respecting it, and to secure its due protection and management; and in such cases the cestui que trust or equitable owner, in general, acquires no right to the possession or use of the land in specie. But the Court exercises a jurisdiction to admit the equitable owner into the possession under circumstances which render it safe and convenient to execute the trust in that manner, upon his giving security for the permanent maintenance of the property; as in cases where the personal occupation of the trust property, instead of the mere receipt of the rents and profits, is specially beneficial to the cestui que trust and consistent with the performance of the trust (d).

<sup>(</sup>a) Arden, M. R., Philips v. Brydges, 3 Ves. 127; Fry, L. J., Re Ridge, L. R. 31 C. D. 507; 55 L. J. C. 265.

<sup>(</sup>b) Goodtitle v. Jones, 7 T. R. 50; Kaye v. Powell, 1 Ves. jun. 408; Jenkins v. Milford, 1 J. & W. 635.

<sup>(</sup>c) The Judicature Act, 1873,

<sup>(8)</sup> The second s 12 Beav. 517.

So where settled land is charged merely with the payment of sums of money and is adequate to satisfy the amount, the Court will in general let the equitable tenant into possession upon his giving security for the charges, and an undertaking against waste (e). Where the trustees of settled estates were directed to keep the buildings in repair and to pay the surplus rents to a tenant for life, the latter was allowed the possession and management of the estate upon giving an undertaking to repair the buildings (f).

<sup>(</sup>e) Blake v. Bunbury, 1 Ves. jun. 194; Jenkins v. Milford, 1 J. & W. (f) Re Bentley, Wade v. Wilson, 54 L. J. C. 782; Powys v. Blagrave, 4 D. M. & G. 456.

## CHAPTER III.

# TREES, WOODS AND TIMBER.

Property in trees—grant of trees as separate property—licence to take trees—contract of sale of trees.

Lease with exception of trees.

Construction of grants and exceptions of trees.

Distinction of timber and other trees.

Right of tenant to cut timber—timber estate—trees not timber—underwood, &c.—ornamental and shelter trees.

Right to cut trees for repairs or fuel, &c.—extent of right—tenant at will and copyholder.

Property in timber cut by tenant—timber cut in collusion with reversioner—property in trees not timber.

Trees severed by wind or accident.

Timber cut by order or sanction of Court—application of proceeds—exercise of jurisdiction—statutory powers to sell timber—Settled Land Act.

Land in general, as subject of property, presumptively Property in includes all things growing upon the surface, as trees, crops, and herbage; and it is so taken in deeds and wills and other legal documents, in the absence of intention expressed to the contrary. Hence, trees presumptively belong to the owner of the land; and acts of ownership upon the trees are presumptive evidence of ownership of the land. A tree growing upon the boundary of two closes, partly in each, presumptively belongs to the two owners as tenants in common; but the presumption would be displaced by ascertaining in which close it was originally planted. If a tree growing in one close sends roots and branches into the adjoining close the owner of the latter close may cut them, as being a nuisance or encroachment upon his property which he is entitled to abate (a).

<sup>(</sup>a) Waterman v. Soper, 1 L. Raym. 737; Holder v. Coates, Moo. & Mal. 112; per eur. Crowhurst v.

Amersham Burial Board, L. R. 4 Ex. D. 10; 48 L. J. Ex. 109.

Grant of trees as separate property.

A grant, or an exception from a grant, of the trees growing in certain land, creates a property in the trees, separate from the property in the soil; but with the right of having them grow and subsist upon it (b). An estate of inheritance in a tree may thus be created; which would be technically described as a fee conditional upon the life of the tree (c). Also there may be a grant or exception of trees thereafter to grow on the soil (d). The separate property in trees growing and to grow upon certain land, admittedly the property of another, may also be proved by acts of ownership in cutting and taking away trees from time to time; the presumption from such evidence being that the land had been originally granted away, with an exception of the trees then growing or thereafter to grow in the soil (e). A grant or exception of trees apart from the soil implies a right to enter upon the land for the purpose of cutting and taking the trees, as a necessary incident of the property in the trees (f).—A licence to enter upon land and to cut down trees and take them away may be granted by the owner of the land without conveying to the grantee any property in the soil, or in the trees until cut down and taken by him. Such right would be in the nature of a profit à prendre or profit to be taken from the land of another; and it is, therefore, treated hereafter in connection with that class of rights (g).

Licence to take trees.

Contract of sale of trees.

The sale of growing trees or underwood is primâ facie a contract for the sale of an interest in land within the 4th section of the Statute of Frauds (h). But if the trees are sold as moveable goods, as in the case of a sale of standing timber at so much per foot to be delivered by the seller, or in any manner that does not give any right to the buyer

<sup>(</sup>b) Liford's Case, 11 Co. 46 b. (c) 11 Co. 49 a, Liford's Case.

<sup>(</sup>d) Barrington's Case, 8 Co. 136 b; per cur. Stanley v. White, 14 East, 338; Gordon v. Woodford, 27 Beav. 603; 29 L. J. C. 222.

<sup>(</sup>e) Stanley v. White, 14 East,

<sup>(</sup>f) 11 Co. 52 a, Liford's Case; per cur. Durham and Sutherland Ry. Co. v. Walker, 2 Q. B. 965. (g) Barrington's Case, 8 Co. 136b; Bailey v. Stevens, 12 C. B. N. S.

<sup>91; 31</sup> L. J. C. P. 226.

<sup>(</sup>h) Teal v. Auty, 2 B. & B. 99; Scorell v. Boxall, 1 Y. & J. 396.

before severance, it is held to be a sale of goods within the 17th section of the statute (i).

A lease of land for life or for years, excepting the trees Lease with growing upon the land, leaves the trees in the possession trees. of the lessor, with the right of having them grow in the soil; the trees then are no part of the demised premises, and the fruit or produce of the trees presumptively goes with the trees (k). Consequently, the wrongful cutting of the excepted trees by the lessee is technically an act of trespass, being committed upon property which is in the possession of another. But if the lessee wrongfully cut trees included in the lease, it is an act of waste and not a trespass, and the distinction is to be observed in the remedy (1). Consequently also, a covenant by the lessee not to cut trees excepted from the lease is purely collateral to the land demised; "for the trees being excepted from the demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees upon an adjoining estate of the lessor." Therefore the covenant will not run with the land; nor will it run with the reversion; but the benefit of it passes to the executor of the covenantee (m).—Upon a grant of land, excepting the trees, in fee simple, the trees are divided in property from the land, although in fact they remain annexed; and if afterwards the grantor grants the trees to the grantee, they are re-united in property as they are in fact, and they are again made parcel of the inheritance. But upon a lease of land, excepting the trees, for a term of life or for years, if the lessor afterwards grants the trees absolutely to the lessee, the trees are not re-united in property to the land; because the lessee has not equality of ownership in both, and it would derogate from the grant

& R. 588.

<sup>(</sup>i) Smith v. Surman, 9 B. & C. 561; Marshall v. Green, L. R. 1 C. P. D. 35; 45 L. J. C. P. 153; but see Lavery v. Purssell, 57 L. J. C. 570.

<sup>(</sup>k) Liford's Case, 11 Co. 50 a; Bullen v. Denning, 5 B. & C. 842. (l) Ante, p. 18; Goodright v. Vivian, 8 East, 190. (n) Raymond v. Fitch, 2 C. M.

of the trees for the lessor to retain any interest in them (n).

Construction of grants and exceptions.

A grant of "woods" or of "underwoods" is sufficient to pass the land itself; those terms are taken primâ fucie to mean not only the trees growing, but the land also upon which they grow; and an exception of those words in a grant or demise of land prima facie excepts the soil (o). But a lease of land "excepting all underwoods, with free entry for felling and carrying away of the same at times convenient," was held not to except the soil, that intention being shown by reserving the power of entry (p). An exception of "timber and other trees" does not except the soil, but only a right to have the trees grow in the soil; and in a lease, "excepting all timber and other trees, woods and underwoods," the words "woods and underwoods," used in connection with "timber and other trees," were construed to mean woods other than timber and not to except the soil (q). An exception in a lease of "all timber and other trees" was construed strictly in favour of the lessee as confined to trees of a like kind to timber trees; and therefore not to except from the lease trees commonly known as fruit-trees, such as apple and other orchard trees (r). A power of leasing with the exception of "all timber trees and trees likely to become timber" was held not well executed by a lease which excepted only "all timber trees and the bodies of all other trees"; for, as it did not except the top and lop of the trees likely to become timber, it demised in terms more than the power authorised (s).

Timber trees.

Trees are distinguished in law as timber trees and trees which do not bear timber, that is, wood fit for building.

(n) Herlakenden's Case, 4 Co. 62 a; Liford's Case, 11 Co. 50 a. (a) Co. Lit. 4 b; Liford's Case, 11 Co. 49 b; Ite's Case, 5 Co. 11 a; Whilster v. Paslow, Cro. Jac. 487. (p) Shepherds' Touchst. by Preston, 100.

 <sup>(</sup>q) Legh v. Heald, 1 B. & Ad. 622.
 (r) Wyndham v. Way, 4 Taunt.
 316; Bullen v. Denning, 5 B. & C.

<sup>(</sup>s) Dec v. Leck, 2 A, & E, 705,

By general custom oak ash and elm are timber trees, provided they are of sufficient age, and provided they are not too old to bear a reasonable quantity of useful wood; beech, willow, birch, aspen, maple, and other trees of like kind are not generally timber. By special local custom, beech, willow and other trees may also be considered timber trees; and they will then pass under that description (t). Fir and larch which are usually planted for profit by thinning until the whole plantation is cut; or for the protection of plantations of timber trees, are not generally timber trees (u).—By a general rule of law trees which are of the description to bear timber become timber trees at twenty years' growth, whether they are timber trees by general or by local custom; no customary variation of this rule being admissible (v).

Timber is not an ordinary profit of land, but is part Right of of the inheritance; therefore tenant for life or years, timber. unless made unimpeachable for waste, is not entitled to cut timber and appropriate it to his own use, although it be ripe for cutting or going to decay (w).—Exception is Timber estate. made of "timber estates" or land cultivated specially for the growth of timber, in which the timber is considered as an ordinary profit, like annual or other periodical crops; and tenant for life is entitled to cut and take the timber coming to maturity from time to time during his tenancy,

<sup>(</sup>t) Co. Lit. 53 a; Chandos v. Talbot, 2 P. Wms. 606; Gordon v. Woodford, 27 Beav. 603; 29 L. J. C. 222; Jessel, M. R., Honywood v. Honywood, L. R. 18 Eq. 309; 43 L. J. C. 652. Beech is timber in the county of Bucks, Aubrey v. Fisher, 10 East, 446; willow in the county of Hants, Hob. 219. (u) Harrison v. Harrison, 54 L. J. C. 617; L. R. 28 C. D. 220.

See Pidgeley v. Rawling, 2 Coll. 275.
(v) 45 Ed. III. c. 3, declaratory
of the common law, 2 Co. Inst.

<sup>643;</sup> Aubrey v. Fisher, 10 East, 446; but see Jessel, M. R., Honywood v. Honywood, L. R. 18 Eq. 309; 43 L. J. C. 652, that the test of trees being timber may be fixed at a greater age, or may be fixed by girth or other considera-tions by local custom.

<sup>(</sup>w) Perrot v. Perrot, 3 Atk. 95; Seagram v. Knight, L. R. 2 Ch. 628; 36 L. J. C. 310; Honywood v. Honywood, L. R. 18 Eq. 306; 43 L. J. C. 652. If it be dead and decayed, see post, p. 35.

subject to the obligation of maintaining the plantations (x). It is said that "in many places oak coppice is felled regularly every sixteen or eighteen years leaving poles which are regularly cut every second fall, i. e., every thirty-two or thirty-six years. This timber would constitute the fair profits of the land, to which the tenant for life would be entitled" (y).

Trees not timber.

Tenant for life may cut and take trees not being timber trees; but subject to impeachment of waste if the cutting is injurious to the inheritance. Cutting trees of any kind that are beneficial to the property, for protection, ornament or other permanent purpose is waste. Thus tenant for years may cut and take willows and other like trees, provided they do not serve for shelter to a house or for support to the bank of a stream or other permanently beneficial purpose (z). So it is said, "If the tenant cut down or destroy any fruit trees growing in the garden or orchard it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste" (a). Where non-timber trees, as larch and fir, are grown in the manner of a timber estate, they can be cut by tenant for life only in due course of taking the profits, and cutting them at other times and for other purposes is waste (b).—Where trees are grown for timber which are as yet too young to be timber trees; these a tenant for life cannot cut, except in the ordinary course of thinning for the improvement of the remaining trees (c). And tenant without impeachment of waste may be restrained from cutting timber of insufficient growth to be

Trees growing into timber.

<sup>(</sup>x) Honywood v. Honywood, L. R. 18 Eq. 309; 43 L. J. C. 652; Wigram, V.-C., Ferrand v. Wil-

son, 4 Hare, 374. (y) Bagot v. Bagot, 32 Beav. 517; 33 L. J. C. 116.

<sup>(</sup>z) Co. Lit. 53 a; Phillips v. Smith, 14 M. & W. 589.
(a) Ibid.

<sup>(</sup>b) Harrison's Trusts, L. R. 28 C. D. 220; 54 L. J. C 617; Bateman v. Hotchkin, 31 Beav. 486; 32 L. J. C. 6.

<sup>(</sup>c)\_Honywood v. Honywood, L. R. 18 Eq. 310; 43 L. J. C. 652; Cowley v. Wellesley, L. R. 1 Eq. 656, as corrected by Jessel, M. R. in Honywood v. Honywood.

taken in the proper course of management (d).—A tenant Underwood. may cut underwood in due course of husbandry; but if he destroy the stubs from which it grows, it is waste (e). He may cut willow trees growing from stubs, in the ordinary way of taking the profit (f). So with oak coppies, where it is worked by regular periodical cuttings (g).—A tenant may Hedges. cut hedges and take the cuttings for his own use, but if he cut in excess or destroy the hedge it is waste (h).—A tenant Dead wood. may cut and take dead trees that are decayed and no longer available for timber or other useful or ornamental purpose, without impeachment of waste (i).

Tenant for life without impeachment of waste may be Ornamental restrained from cutting down trees that have been planted trees. or left for ornament or shelter or any permanent purpose other than mere profit, except so far as may be required for the improvement of the rest of the trees or for the improvement of the estate at large; in which case the Court would, in general, in allowing the cutting, require it to be done under the direction and supervision of the Court. If such timber has been cut without leave, the Court will direct an inquiry whether it was properly cut, and in that case only will allow the tenant for life to have the proceeds for his own benefit (k). Trees may be protected as ornamental with reference to a house as a place of residence; or with reference to an estate laid out in rides and drives; or with reference to distant views from a house or grounds, for which reason a clump of firs two miles from a house has been protected as being ornamental (l). On the other hand trees originally planted for ornament to a house may cease

<sup>(</sup>d) Brydges v. Stephens, 6 Madd. 279; 2 Swanst. 150.

<sup>(</sup>e) Co. Lit. 53 a; Bateman v. Hotchkin, 31 Beav. 486; 32 L. J.

<sup>(</sup>f) Phillips v. Smith, 14 M. & W. 589; ante, p. 34.
(g) Bagot v. Bagot, 32 Beav. 509; 33 L. J. C. 116.

<sup>(</sup>h) Berriman v. Peacock, 9 Bing. 384.

<sup>(</sup>i) Co. Lit. 53 a; Manwood v. Myme, Dyer, 332.

Myme, Dyer, 532.
(B. Baker v. Sebright, L. R. 13
(C. D. 179; 49 L. J. C. 65; Lushington v. Boldero, 6 Madd. 149; 15 Beav. 1; 21 L. J. C. 49; Ford v. Tynte, 2 D. J. & S. 127.

<sup>(1)</sup> Downshire v. Sandys, 6 Ves. 107.

to be protected upon the pulling down of the house and abandonment of the site as a residence (m).

Right to cut trees for repair, &c.

A tenant for life or years is entitled, as an incident of his tenancy at common law, to cut timber and other trees to provide reasonable supplies of wood for the use and main-These were anciently tenance of the demised premises. termed botes or estovers, signifying supplies or materials, and are of the following kind: House bote, a sufficient supply of wood to repair houses and buildings, and to provide domestic fuel; Plough bote, sufficient wood for repairing ploughs, and implements of husbandry; Hay or hedge bote, for repairing fences, gates, styles, and the like. "And these the lessee may take upon the land demised without any assignment, unless he be restrained by special covenant; and the same estovers that tenant for life may have, tenant for years shall have" (n). The right to take estovers from land other than that demised is a profit à prendre (o). A tenant may take timber to make repairs, although he be not compellable to repair, nor impeachable for waste in the non-repair. "So if the lessor by his covenant undertaketh to repair the house, yet the lessee (if the lessor doth it not) may with the timber growing upon the land repair it, though he be not compellable thereunto "(p).— These rights must be exercised in a reasonable manner; the tenant may not cut growing trees for fuel, where there is sufficient dead wood; to do so is waste (q). He may not cut timber for making fences for new enclosures (r). He may not cut timber and sell it for the purpose of providing other materials required for repairs with the proceeds of the sale; and if he cuts unsuitable material, it is no justification or mitigation of the wrong, that he afterwards sold it and applied the proceeds in repairs (s). But

Extent of right.

<sup>(</sup>m) Micklethwait v. Micklethwait, 1 De G. & J. 504; 26 L. J. C. 721. (n) Co. Lit. 41 b; 53 b; Heydon v. Smith, 13 Co. 68.

<sup>(</sup>o) See post, p. 326.

<sup>(</sup>p) Co. Lit. 54 b. (q) Co. Lit. 53 b. (r) Manwood v. Myme, Dyer, 332. (s) Co. Lit. 53 b; Simmons v. Norton, 7 Bing. 640.

it seems that where the available timber is inconveniently situated, he may sell it on the spot for the purpose of buying other timber where it is wanted, in order to save the carriage (t).

A tenant at will, not being liable for repairs, is not Tenant at will entitled to estovers of timber for that purpose (u). A copy-holder. holder, as being a tenant at will at common law, would not be so entitled; but the custom of most manors sanctions in a greater or less degree the taking of estovers of timber and other materials for repairs, fuel, fencing and the like according to the requirements of the tenement (r). The customary right of a copyholder is appurtenant to the tenement, and independent of the title to the manor, or to the trees, which may be granted or excepted from the manor without affecting the right of the copyholder (w). If the copyholder, entitled to cut wood for estovers, cuts for other purposes, as for sale, it is waste, which is a ground of forfeiture of the tenement, and the lord may bring ejectment and is entitled to the timber  $\operatorname{cut}(x)$ .

As to the property in trees cut wastefully or wrongfully Property in during a tenancy for life or for years, there is a distinction timber cut by tenant. between timber trees and trees that are not timber. timber trees be severed during a particular tenancy, whether by the tenant or another, the tenant being impeachable for waste, the estate or interest of the tenant in the trees is determined by the severance; the trees are thereby disannexed from the land and reduced to the state of personal chattels, and the property, by the rule of common law, vests immediately in the person entitled to the first vested estate of inheritance, in fee or in tail. He may bring an action to recover the trees, as having become

<sup>(</sup>t) Marlborough v. St. John, 5 D. & Sm. 174; 21 L. J. C. 381; Sowerby v. Fryer, L. R. 8 Eq. 417; 38 L. J. C. 617.

(u) Lit. v. 71; Co Lit. 57 a.

(v) Scriven Cop. 424, 4th ed.; East v. Harding, Cro. Eliz. 292,

<sup>498; &</sup>quot;Swayne's Case, 8 Co. 63; Heydon v. Smith, 13 Co. 67; Ashmead v. Ranger, 1 L. Raym. 551.

<sup>(</sup>w) Swayne's Case, 8 Co. 63. (x) Doe v. Wilson, 11 East, 56; Blackett v. Lowes, 2 M. & S. 494.

his property from the moment they were felled, or an action to recover the proceeds of a sale of the trees as money received to his use; he is also entitled to discovery of the value of the timber which has been cut down by, and is in the possession of, the tenant, or which has been sold by him(y). Tenant for life in remainder has no claim at law to the timber wastefully cut by the tenant in possession; nor though his own estate be specially licensed to commit waste, for such licence would only entitle him to cut timber during his own possession (z). But he may obtain an injunction to restrain the cutting of trees to the detriment of his expectant interest in the future possession (a). If the tenant in possession be unimpeachable for waste, the trees cut during his tenancy, whether by himself or by a stranger, vest in the tenant himself the Timber cut in moment they are cut down (b).—"There is in equity an exception where the owner of the first vested estate of inheritance has colluded with the tenant for life (impeachable for waste) to induce the tenant for life to cut down timber; and then equity interferes and will not allow him to get the benefit of his own wrong." The Court, in exercise of equitable jurisdiction to prevent fraud, will require the proceeds of any such cutting to be brought into Court and invested for the benefit of the successive owners under the settlement, exclusive of the tenant for life (c). Accordingly, where the tenant in possession and the ultimate reversioner agreed to cut timber and divide the proceeds, and an intermediate contingent remainder in tail afterwards became vested, the Court decreed that the tenant in tail was entitled to recover the proceeds of

collusion with · reversioner.

<sup>(</sup>y) Bowle's Case, 11 Co. 81 b; Garth v. Cotton, 1 Ves. 524; 1 W. & T. L. C. 674; Whitfield v. Bewit, 2 P. Wms. 240; 3 P. Wms. 266; Bagot v. Bagot, 32 Beav. 509; 33 L. J. C. 116; Chelmsford, L. C., Seagram v. Knight, L. R. 2 Ch. 632; 36 L. J. C. 310. (z) Ante. p. 23: Pinot v. Rullank

<sup>(</sup>z) Ante, p. 23; Pigot v. Bullock, 1 Ves. jun. 479; per cur. Gent v.

Harrison, Johns. 517; 29 L. J. C.

<sup>70.
(</sup>a) Perrot v. Perrot, 3 Atk. 94.
(b) Ante, p. 23; Pyne v. Dor, 1
T. R. 55; Re Barrington, L. R.
33 C. D. 527; 56 L. J. C. 177.
(c) Jessel, M. R., Honywood v.
Honywood, L. R. 18 Eq. 311; 43
L. J. C. 652; Lushington v. Boldero, 15 Beav. 1; 21 L. J. C. 49.

the timber (d). So where the tenancy for life in possession Timber trees. and the ultimate reversion were vested in one person, subject to intervening interests, he was restrained from cutting timber for his own benefit to the exclusion of other persons intermediately interested (e).

"As to the property in trees not timber, that is, those Property in which are not timber either from their nature or because trees not timber. they are not old enough or because they are too old, the property is in the tenant for life. If he cuts them down wrongfully and commits waste, the property is still in him though he has committed a wrong and would be liable to an action in the nature of waste" (f).—Where a lessor entered upon the demised premises and cut down oak pollards which were unfit for timber; it was held that the property in the trees cut vested in the tenant (g). And where a hedge was cut by a stranger, it was held that the property in the cuttings belonged to the tenant and not to the landlord (h).

By the general rule of the common law timber severed Trees severed by wind or other accident, also timber severed by a by wind or accident. trespasser, become the property of the person entitled to the first vested estate of inheritance, in fee or in tail; unless the tenant in possession be unimpeachable of waste, in which case the timber so severed vests in him, as being entitled to cut it himself for his own use during his tenancy (i). Trees, other than timber trees, severed by

(d) Garth v. Cotton, 1 Ves. 524; 1 White & T. L. C. 623. (e) Williams v. Duke of Bolton, 1 Cox, 72; 3 P. Wms. 268, n; Birch Wolfe v. Birch, L. R. 9 Eq. 683; 39 L. J. C. 345.

(f) Honywood, L. R. 18 Eq. 311; 43 L. J. C. 652, Jessel, M. R. who added, "I am not sure that would follow in equity, my impression is that equity would say that he should not be allowed to take the benefit of his own wrong, and that he should not be allowed to take the property in those trees he cuts down. This is not the case at common law, and I am not aware that the exact point has been decided in equity." As to waste in cutting young timber trees, see ante, p. 34.

(g) Channon v. Patch, 5 B. & C. 897.

(h) Berriman v. Peacock, 9 Bing.

(i) Pyne v. Dor, 1 T. R. 55; Re Barrington, L. R. 33 C. D. 527; 56 L. J. C. 177. Windfalls of timber.

wind or other accident, become the property of the tenant in possession, whether impeachable of waste or not (j). But the Court of Chancery has jurisdiction to order the proceeds of windfalls to be invested to form a fund for the benefit of all parties according to their interests in the settled estate (k). "If a large quantity of timber is destroyed by a storm, upon an estate, that would be laid out in the purchase of stock, and the interest of the fund would be paid to the successive tenants for life "(1). Upon a timber estate where the tenant for life is entitled to cut timber in due course as part of his ordinary profit, the proceeds of windfalls would be invested and applied as nearly as possible in the same manner as the actual profits of cutting (m). Trees are not considered as windfalls unless severed from the soil; trees thrown down by the wind which still remain attached to the soil, belong to the inheritance; the attachment or severance being a question of fact as to each particular tree (n).

Timber cut by order or sanction of Court.

Where land is settled, and the tenant for life is impeachable for waste, there is no legal right to cut timber during his tenancy, though it be ripe for cutting or going to decay. Under such circumstances the Court of Chancery exercises jurisdiction to order the cutting of timber for the preservation and improvement of the property, upon application made for that purpose by any of the parties interested (o). Trustees of the settled estate may have a power of cutting timber given to them by the settlement without application to the Court; and, in general, they would be justified in doing in this respect without a previous order whatever

<sup>(</sup>j) 11 Co. 81 b, Bowle's Cusc, cited by the Court in Tooker v. Annesley, 5 Sim. 240; Bateman v. Hotchkin, 31 Beav. 486; 32 L. J. R. 18 Eq. 306; 43 L. J. C. 652.

(k) Bagot v. Bagot, 32 Beav. 509; 33 L. J. C. 116.

<sup>(1)</sup> Romilly, M. R., Lushington

v. Boldero, 15 Beav. 1; 21 L. J.

<sup>(</sup>m) Harrison v. Harrison, L. R. 28 C. D. 220; 54 L. J. C. 26; ante, p. 33.

<sup>(</sup>n) Re Ainslie, L. R. 30 C. D. 485; 55 L. J. C. 615.

(o) Bewick v. Whitfield, 3 P.

Wms. 266.

the Court upon application would order them to do. tenant for life has no such power of cutting timber for the benefit of the property, and if he does so without previous sanction, the Court will not subsequently ratify the act (p). A power of sale in trustees of settled estates does not authorize a sale of the land and of the growing timber separately without an express authority for that purpose: and a sale in excess of the power in this respect would be void both at law and in equity (q).—The Court requires Application that timber cut by its order and sanction shall be converted of proceeds of timber. into money and invested to form a fund representing the growing timber, and following as nearly as possible the uses and limitations of the settlement. The income of this fund is payable to the tenant for life and to the other successive owners of the estate, until the vesting of the first absolute estate of inheritance in possession, the owner of which, as he could himself have cut the timber, then becomes entitled to have the whole fund (r). The tenant for life in possession, though impeachable for waste, and therefore without any right in the timber as such, is allowed the income of the fund in right of his possessory use of the trees while standing (s). A tenant for life "without impeachment of waste," on coming into possession, becomes absolutely entitled to the capital fund representing the timber, in right of his power to cut and take the timber absolutely for his own use during his possession (t). The fund representing the timber cut so far retains the character of the real property from which it

<sup>(</sup>p) Chelmsford, L. C., Seagram v. Knight, L. R. 2 Ch. 630; 36 L. J. C. 310; Denton v. Denton, 7 Beav. 388.

Beav. 388.
(q) Cholmeley v. Paxton, 3 Bing.
207; S. C. nom., Cockerell v. Cholmeley, 10 B. & C. 564; 1 Cl. &
F. 61; Buckley v. Howell, 29 Beav.
546; 30 L. J. C. 524.
(r) Jessel, M. R., Honywood v.
Honywood, L. R. 18 Ch. 311; 43
L. J. C. 652; Shadwell, V.-C.,

Waldo v. Waldo, 12 Sim. 112; Mildway v. Mildmay, 4 Bro. C. C. 76. (s) Tooker v. Annesley, 5 Sim. 235; Waldo v. Waldo, 7 Sim. 261; 12 Sim. 107; Bagot v. Bagot, 32 Beav. 509; 33 L. J. C. 116. (t) Waldo v. Waldo, 12 Sim. 107; Phillips v. Barlow, 14 Sim. 263; Gent v. Harrison, Johns, 517; 29 L. J. C. 68; Lowndes v. Norton, L. R. 6 C. D. 139; 46 L. J. C. 613.

Ornamental timber.

is derived, that upon the death of the owner of the inheritance before possession, his claim to the fund passes to his heir as real estate (u). Timber severed during the tenancy of a person absolutely entitled becomes a personal chattel, and passes to his executor and not to a devisee of the land (v).—The same course is adopted "where ornamental trees, or trees which could not otherwise be cut down even by a tenant for life unimpeachable for waste, are cut down; the proceeds are invested so as to follow the uses of the settlement" (w). A tenant unimpeachable for waste is entitled absolutely to the ornamental trees properly cut down during his possession by the order or with the sanction of the Court, or to the fund representing the proceeds (x).

Exercise of jurisdiction.

"The principle upon which the Court acts in directing timber to be cut is not the personal benefit of the parties, but the benefit of the estate itself." The Court will not order or sanction the cutting of timber, unless there are special circumstances rendering the cutting necessary or advantageous for the preservation or improvement of the property; as that the timber is going to decay or is overcrowded (y). Accordingly, in the case of an infant tenant in tail in possession (whose estate of inheritance entitles him to the timber), the Court will authorize the cutting of all timber which is fit and proper to be felled in a due course of management; but in the case of a tenant for life in possession, impeachable of waste (who has no right to cut any timber), the Court will only authorize the cutting of such timber as is decaying or which it is beneficial to cut by reason that it injures the growth of other trees (z).

<sup>(</sup>u) Field v. Brown, 27 Beav. 90. (v) Re Ainslie, L. R. 30 C. D.

<sup>(</sup>w) Jessel, M. R., L. R. 18 Eq. 311; 43 L. J. C. 652; Lushington v. Boldero, 15 Beav. 1; 21 L. J. C. 49.

<sup>(</sup>x) Baker v. Sebright, L. R. 13 C. D. 179; 49 L. J. C. 65.

<sup>(</sup>y) Hussey v. Hussey, 5 Madd. 44; Tooker v. Annesley, 5 Sim. 240; Seagram v. Knight, L. R. 2 Ch. 628; 36 L. J. C. 310.

<sup>(</sup>z) Hussey v. Hussey, supra; Tollemache v. Tollemache, 1 Hare, 456; Ferrand v. Wilson, 4 Hare, 382.

By the Settled Estates Act, 1877, 40 & 41 Vict. c. 18, Statutory ss. 16, 34 (re-enacting 19 & 20 Vict. c. 120, s. 11), "It timber." shall be lawful for the Court from time to time to authorize a sale of the whole or any parts of any settled estates, or of any timber (not being ornamental timber) growing on any settled estates"; and to apply the money received on any sale in the purchase or redemption of incumbrances; or in the purchase of hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or in payment to any person becoming absolutely entitled. Under this enactment the Court ordered money arising from a sale of timber to be expended in erecting new farm buildings, upon the principle that the erection of buildings is substantially the same thing as the purchase of an estate (a).—By the Settled Land Act, 1882, 45 & 46 Vict. c. 38, s. 35, Settled Land "Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof." And "three-fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits." Tenant for life without impeachment of waste, selling a settled estate under the powers of the Settled Land Act, upon conditions of sale that the purchaser is to take the timber at a valuation, is not entitled absolutely to the price of the timber; it is an addition to the price of the estate which must be treated as capital money payable to the trustees under the 21st section of the Act (b).

<sup>(</sup>a) Re Newman's Estates, L. R. 9 Ch. 681; 43 L. J. C. 702.

<sup>(</sup>b) Re Llewellin, L. R. 37 C. D. 317; 57 L. J. C. 316; see Doran v. Wiltshire, 3 Swanst. 699.

# CHAPTER IV.

#### GROWING CROPS.

Emblements or growing crops—pass to executor—may be taken in execution—may be distrained.

Tenant's right to emblements—tenant for years—tenant from year to year—tenant at will—at sufferance—wrongful possession.

Growing crops pass with land by conveyance—by devise.

Sale of growing crops separately—Statute of Frauds—Bills of Sale Act.

Emblements.

The term "emblements" is used to designate the growing crops cultivated by the labour and at the cost of the tenant in possession, which are treated in law for many purposes as moveable chattels and as the personal property of the tenant, because his intention in cultivating them is to increase his personal estate rather than to benefit the heir or successor to the land. The class of things thus designated includes the annual crops of corn and grain, hemp and flax, hops, potatoes, turnips and the like, clover and artificial grasses; but not "growing grass which is the natural and permanent produce of the land renewed from time to time without cultivation" (a). It does not include timber or other trees, whether mature or immature; nor does it include the growing fruit of trees, as growing crops of apples and pears (b). The term as used in law conveys only the present annual crop, and not the future crops of cultivated products which bear annual crops for several successive years, as of clover and artificial grasses (c).

<sup>(</sup>a) Co. Lit. 55 b; Wms. Ex. 597, 4th ed.; per cur. Evans v. Roberts, 5 B. & C. 832.

<sup>(</sup>b) Co. Lit. 55 b; per cur. Evans

v. Roberts, 5 B. & C. 835; Rodwell v. Phillips, 9 M. & W. 505. (c) Graves v. Weld, 5 B. & Ad.

Growing crops are treated in law as personal chattels for the following purposes: - They are transmissible at death Pass to as personal estate. Upon the death of a tenant in fee in possession, whether tenant in fee simple or in fee tail, also upon the death of a tenant for life in possession, the emblements or then growing crops pass to the executor or administrator of the deceased tenant, and not, with the land, to the heir or reversioner (d). So, in the case of a tenant for a certain term of years, if he shall so long live, whose tenancy is determined by his death within the term, the emblements pass to his executor (e).—Growing crops Execution. may be taken in execution as personal chattels under a writ of fieri facias. "The sheriff may sell fructus industriales, as corn growing, which goes to the executor. distinction is between those things which go to the executor and those which go to the heir; the former may be seized and sold under the fi. fa., the latter cannot. The former must, therefore, in contemplation of law be considered chattels" (f). "But things which give no annual profit, or which proceed without the labour of man, are not emblements; they go to the heir and cannot be seized under a fi. fa." (g). Thus, "growing grass does not come within the description of chattels and cannot be seized as such under a fi. fa.; it goes to the heir and not to the executor; but growing potatoes come within the description of emblements and are deemed chattels by reason of their being raised by labour and manurance "(h). "Growing fruit would not pass to an executor, but to the heir; it could not be taken by the executor of a tenant for life, or levied in execution under a writ of fi. fa. by the sheriff" (i). By the statute 56 Geo. III. c. 50, growing crops are protected from being seized in execution under a

<sup>(</sup>d) Co. Lit. 55 b; Wms. Ex. 599, 692, 4th ed.; Hardwicke, L.C. Lawton v Lawton, 3 Atk. 16.
(e) Co. Lit. 55 b.
(f) Bayley, J. Evans v. Roberts, 5 B. & C. 835.

<sup>(</sup>g) Scovell v. Boxall, 1 Y. & J. 398. (h) Per cur. Evans v. Roberts, 5

B. & C. 832.

<sup>(</sup>i) Per cur. Rodwell v. Phillips, 9 M. & W. 505.

Distress.

fi. fa., where the tenant is restrained by covenant in his lease from removing them off the premises.—By the statute 11 Geo. II. c. 19, s. 8, growing crops are made liable to a distress for rent; and when cut and gathered they may be sold under the distress. If distrained, they may be replevied as goods and chattels (j).

Tenant's right to emblements.

Upon the expiration of a tenancy for years by mere lapse of time, the tenant retains no right to the then growing crops, unless by stipulation in his lease, or by a custom of the country respecting them; because the termination of his term being certain he could provide against it. So, if a tenant determines his tenancy by his own act, as by himself giving notice to quit, or surrendering the lease, or committing waste or breach of covenant or condition which induces a forfeiture, he is not entitled to take the emblements (k). As where a woman holding an estate during widowhood, after sowing the land, married, it was held that her estate being determined by her own act, neither she nor her husband could claim to take the crops (1). So a lessee who has forfeited his lease by his bankruptcy, under a proviso for re-entry in that event (m); and the incumbent of a living who determines his estate in the glebe by voluntary resignation, is not entitled to take the emblements (n).—But if the tenancy is determined by an uncertain event over which the tenant has no control; as in the case of a tenant pur autre vie whose tenancy is determined by death of the cestui que vie (o); or of a tenancy for years under a lease granted by a tenant for life. which is determined by the death of the lessor; the tenant is entitled to take the emblements, and to enter upon the land so far as is necessary to take them, after the deter-

<sup>(</sup>j) See post, p. 448. (k) Co. Lit. 55 b; Wigglesworth v. Dallison, Dougl. 201; 1 Smith, L. C.; see Mansel v. Norton, L. R. 22 C. D. 769.

<sup>(1)</sup> Oland's Case, 5 Co. 116 a.

<sup>(</sup>m) Davis v. Eyton, 7 Bing. 154.
(n) Bulwer v. Bulwer, 2 B. & Ald. 470.

<sup>(</sup>o) Graves v. Weld, 5 B. & Ad. 105.

mination of his tenancy (p).—It is a "general rule of law applicable to cases of this description, that where a tenant of land has an uncertain interest which is determined either by the act of God or the act of another, there he shall have the emblements; but that is not so where the tenancy is determined by his own act "(q).—Thus the lessee of a woman who holds during widowhood, and whose estate is determined by her marriage, is entitled to take emblements; and the lessee of the glebe of an incumbent who resigns; for in these cases the tenancy is determined by the act of another and not by an act of the tenant himself (r).—In the case of a tenancy determining by the death or cesser of the estate of any landlord entitled for his life or for any uncertain interest, it is provided by 14 & 15 Vict. c. 25, s. 1, that instead of claims to emblements the tenant shall continue to hold until the expiration of the then current year of his tenancy; and the succeeding landlord shall be entitled to recover a fair proportion of the rent for the period elapsed from the cesser of the estate of his predecessor; and he may recover this rent by action or by distress (s).

Upon the above principles a tenant from year to year Tenancy from whose tenancy is determined by notice to quit from the year to year. landlord is entitled to enblements, because of the uncertainty of the notice (t). Under the Agricultural Holdings Act, 1875, 38 & 39 Vict. c. 92, s. 51, a year's notice is required for tenancies from year to year of agricultural holdings within the Act, in the absence of special agreement respecting the notice. The year's notice would allow the tenant full time for taking an annual crop.-A. Tenant at tenant at will is entitled to emblements upon the determination of the tenancy by the will of the lessor, but not if

<sup>(</sup>p) Co. Lit. 55 a, b. (q) Bulwer v. Bulwer, 2 B. &

<sup>(</sup>r) Per cur. Oland v. Burdwick, Cro. Eliz. 460; Bulwer v. Bulwer, sup.

<sup>(</sup>s) Haines v. Welch, L. R. 4 C. P. 91; 38 L. J. C. P. 118. (t) Kingsbury v. Collins, 4 Bing.

"The law is that

he determines it by his own will (u).

if the estate of a tenant at will be determined either by his death or the act of his landlord, he in the one case and his executors or administrators in the other shall reap what he has sown; and that he or his representatives shall have free liberty to come upon the land to cut and carry away the corn." Consequently the landlord can only let the land subject to this right, and he cannot distrain the crops for the rent of the succeeding tenant (v).— A tenant merely at sufferance has no claim to emblements upon the determination of his possession. A mortgagor in possession at law, in the absence of any special agreement as to his relation to the mortgagee, is no more than a tenant at sufferance: he is liable to be treated as tenant or as trespasser at the option of the mortgagee and without any notice; and upon dispossession by the mortgagee he is not entitled to emblements, the mortgagee being entitled to enter and take everything belonging to the land as part But it seems that a lessee of the mortof his security (w). gagor in possession, if dispossessed by the mortgagee, is entitled to emblements, because the mortgagee must be taken to have acquiesced in the letting (x). Now by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 18, it is provided that, "a mortgagor of land while in possession shall as against every incumbrancer have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land or any part thereof as is in this section described and authorized." But "this section applies only in case of a mortgage made after the commencement of this Act."—A wrongful possession, as that of a disseisor, does not entitle to emblements upon eviction. Where the estate of the tenant is defeasible by a right

paramount, he is not entitled to emblements as against the

Tenant at sufferance.

Wrongful possession.

<sup>(</sup>u) Lit. s. 68; Co. Lit. 55 b; 5 Co. 116 a.

<sup>(</sup>v) Eaton v. Southby, Willes, 131. (w) Mansfield, C. J. Keech v.

Hall, Dougl. 22; Doe v. Maisey, 8

B. & C. 767; ante, vol. i. p. 290. (x) Sanders v. Davis, L. R. 15 Q. B. D. 218; 54 L. J. Q. B. 576.

superior title (y). A tenant in wrongful possession, against whom a judgment in ejectment has been obtained, can make no claim to emblements after the date of the claim in the ejectment; nor can they be seized under an execution against him (z).

Growing crops of all kinds, as being annexed to the Growing soil, presumptively pass by a conveyance of the land, and with the land. by a mortgage of the land; unless expressly excepted. Upon the bankruptcy of a mortgagor in possession, they belong primâ facie to the mortgagee, as against the receiver in the bankruptcy; but if severed at the time of the bankruptcy, they pass to the receiver (a).—They pass also by a Devise. devise of the land, unless expressly excepted, or separately bequeathed (b). A bequest of "farming stock," or of "the stock upon a farm," or of "live and dead stock," or in other like terms, passes the growing crops to the legatee (c).

The growing crops may be sold and assigned separately Sale of crops from the land, and crops to be grown on land in future separately. years may be the subject of separate sale and assignment (d). And the right to emblements or growing crops apart from the land, whether arising from sale or from tenant right, implies the accessory right of entering upon the land to take and carry away the crops in due course of husbandry, and also a reasonable allowance of time for that purpose (e).—A contract for the sale of emblements Statute of or growing crops separately from the land is within the 17th section of the Statute of Frauds, which applies to the sale of goods, and not a contract concerning an interest in

<sup>(</sup>y) Co. Lit. 55 b. (z) Hodgson v. Gascoign, 5 B. & Ald. 88.

<sup>(</sup>a) Bagnall v. Villar, L. R. 12 C. D. 812; 48 L. J. C. 695; Exp. National Mercantile Bank, L. R. 16

C. D. 104; 50 L. J. C. 231. (b) Hargrave's note(1) to Co. Lit. 55 b; Shep. Touch. by Preston,

<sup>(</sup>c) Cox v. Godsalve, 6 East, 604, n.;

West v. Moore, 8 East, 339; Evans v. Williamson, L. R. 17 C. D. 696; 50 L. J. C. 197, dissenting from Vaisey v. Reynolds, 5 Russ. 12.

<sup>(</sup>d) Petch v. Tutin, 15 M. & W. 110; Grantham v. Hawley, Hob.

<sup>(</sup>e) Lit. ss. 68, 69; Co. Lit. 56 α; Doe v. McKaeg, 10 B. & C. 721; Cornish v. Stubbs, L. R. 5 C. P. 334; 39 L. J. C. P. 202.

land within the 4th section (f). The sale of pasture or of a permanent crop, as of grass, to be cut or fed by the buyer, is a contract concerning an interest in land within the 4th section (a).

Bills of sale.

By the Bills of Sale Act, 1878, 41 & 42 Vict. c. 31, s. 4, "personal chattels," the subjects of bills of sale, are interpreted to mean, amongst other things, "growing crops when separately assigned or charged," but not to include "growing crops when assigned together with any interest in the land on which they grow." By the Bills of Sale Act, 1882, 45 & 46 Vict. c. 43, s. 4, a schedule is to be annexed to a bill of sale, confining its effect to the personal chattels comprised in the schedule; but s. 6 (1) excepts "any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed." The separate assignment is construed to mean an assignment separately from any interest in the land on which they grow, and not also separately from other goods (h). The original Bills of Sale Act, 1854 (repealed by the above Act, 1878), applying to "goods and other articles capable of complete delivery," was construed not to apply to growing crops (i). If subsequently to the granting of a bill of sale including growing crops, they are severed by the grantor, they become personal chattels; and the bill of sale must be registered and satisfy all requirements of the Bills of Sale Acts in order to secure the crops to the grantee in the event of the grantor becoming bankrupt while they still remain in his possession (k).

<sup>(</sup>f) Evans v. Roberts, 5 B. & C. 829; Jones v. Flint, 10 A. & E. 753; Scovell v. Boxall, 1 Y. & J. 396; Rodwell v. Phillips, 9 M. & W. 501; Leake on Contracts,

<sup>(</sup>g) Crossley v. Wadsworth, 6 East, 602; Carrington v. Roots, 2 M. & W. 248.

<sup>(</sup>h) Roberts v. Roberts, L. R. 13 Q. B. D. 794; 53 L. J. Q. B. 313.

<sup>(</sup>i) Brantom v. Griffits, L. R. 2 C. P. D. 212; 45 L. J. C. P. 588; Exp. Payne, L. R. 11 C. D. 539. (k) Exp. National Mercantile Bank, L. R. 16 C. D. 104; 50 L. J. C.

<sup>231.</sup> 

# CHAPTER V.

## MINES AND MINERALS.

Property in minerals—separate property in minerals—power to sell minerals separately.

Licence to get minerals—distinction of licence and property—construction of grant or licence—exclusive licence—remedies of licensee.

Relative rights of owners of surface and minerals—right of support for surface.

Lease of minerals—right of lessee to the minerals.

Rights of tenants for life or years to take minerals-open mines.

Mines opened by order of Court—by trustees under powers of making mining leases—under Settled Land Act.

Minerals in copyhold tenements—special customs—minerals in freeholds of manor—minerals in waste of manor.

Minerals under railways—severance of access to minerals—superfluous land.

Construction of terms, minerals, mines, and quarries.

Prerogative of gold and silver—grants of royal mines—treasure trove—prerogative of saltpetre—public rights of mining.

Property in land, as defined and bounded by the Property in superficial area, presumptively extends to everything contained below the surface, including whatever passes under the description of minerals, except gold and silver, which are a prerogative right of the Crown (a). A conveyance of land in fee simple primâ facie passes the minerals and everything below the surface (b); and possession of the surface is primâ facie evidence of the ownership of the soil beneath, including the minerals (c).

Minerals may be partitioned from the surface and Separate treated as a separate subject of property. The owner of property in minerals.

<sup>(</sup>a) Co. Lit. 4a; post, p. 70. (b) Egremont Burial Board v. Egremont Iron Co., L. R. 14 C. D. (c) See Tyrwhitt v. Wynne, 2 B. & Ald. 554; Seddon v. Smith, 36 Law Times, 168.

land may create a separate property in minerals; either by granting away that part of the land which contains the minerals, reserving to himself the surface and all other parts; or by granting away the land, with express exception to himself of the part containing the minerals. either way the minerals thus partitioned from the rest of the land constitute a separate corporeal hereditament subject to all the incidents of real property, so far as they apply to such special form of hereditament (d).—A power or trust to sell land in general terms does not authorize a sale of the surface with exception of the minerals, or of the minerals separately from the land (e). The statute 25 & 26 Vict. c. 108, was passed to confirm dispositions of land and minerals separately, which were then liable to be invalidated from the above cause. It proceeds by sect. 2 to extend for the future trusts and powers of sale by enacting that "Every trustee or other person authorized to dispose of land by way of sale, exchange, partition or enfranchisement, may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, or may dispose of by way of sale, exchange or partition, the minerals separately from the residue of the land;" but not without the previous sanction of the Court of Chancery. statute applies to mortgagees having powers of sale, as well as to trustees (f). Under this statute the Court may give a general order or sanction to authorize the disposal of the mines and of the land separately and at different times as occasion may require (g).—Under the powers of the Settled Land Act, 1882, 45 & 46 Vict. c. 38, s. 17, "A sale, exchange, partition or mining lease may be made either

Power to sell land or minerals separately.

<sup>(</sup>d) Stoughton v. Leigh, 1 Taunt. 402; Wilkinson v. Proud, 11 M. & W. 33; Mellish, L. J., Aspden v. Seddon, L. R. 1 Ex. D. 509; 46 L. J. Ex. 353

<sup>(</sup>e) Buckley v. Howell, 29 Beav. **54**6; 30 L. J. C. 524.

<sup>(</sup>f) Beaumont's Trusts, L. R. 12 Eq. 86; 40 L. J. C. 400; Wilkinson's Estates, L. R. 13 Eq. 634; 41 L. J. C. 392.

<sup>(</sup>g) Wynn's Estates, L. R. 16 Eq. 237; 43 L. J. C. 95. See Palmer's Will, L. R. 13 Eq. 408.

of land with, or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working," and other powers and privileges connected with mining purposes in relation to the settled land or any other land.

A licence may be granted to enter land and to search Licence to get for and get minerals without granting any estate in the land itself; the grantee then takes no estate or property in the land or in any specific portion of it, but acquires property only in such minerals as he may get under the licence; which "is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it" (h). The licence is an incorporeal hereditament of the nature of a profit à prendre in the land of another. As such, it may be claimed by prescription; whereas an estate or property in the land itself cannot be so claimed, but must be claimed by a title founded on seisin or possession (i).—A Distinction of licence and licence may be as beneficial as a grant of property as re-property. gards the getting of the minerals; but it does not carry with it, as the latter does, any other proprietary uses and profits of the space containing the minerals. For instance, a mere licence to work a substratum of minerals does not give the right to use the space as a way for passage and traffic to and from adjacent mines, which is an ordinary incident of the property in the substratum itself (k). So the licence to take minerals of a specified kind would not give any right to take other minerals found in combination with them in the same working; as in the case of a tin

<sup>(</sup>h) Per cur., Doe v. Wood, 2 B. & Ald. 739; Muskett v. Hill, 5 Bing. N. C. 706.

<sup>(</sup>i) See post, p. 329. Wilkinson v. Proud, 11 M. & W. 33.

<sup>(</sup>k) Ramsay v. Blair, L. R. 1 Ap.

Ca. 701; Duke of Hamilton v. Graham, L. R. 2 Sc. Ap. 166; Bowser v. Maclean, 2 D. F. & J. 420; 30 L. J. C. 273; Jessel, M. R., Eardley v. Granville, L. R. 3 C. D. 832; 45 L. J. C. 669.

Construction of grant or licence.

bounder extracting copper with the tin, who has no right to the copper, nor to any other metal than the tin which he in fact extracts (1).—Whether a deed operates to convey the land itself containing minerals, or only to give a licence to get minerals within the space defined, is a question of construction of the words used. Such a licence cannot be given by way of exception to a grant of land, because nothing can be the subject of an exception, strictly speaking, that is not part of the thing granted, and the licence is a new and distinct species of right which can be created by grant only. If expressed to be reserved or excepted out of land granted, it can take effect only by implying a re-grant of the licence from the grantee of the land to the grantor. Hence where mines and minerals are expressed to be an exception from a grant of the land, they will in general be construed according to the literal form of words as intended to except the soil itself containing the minerals, and not as creating a mere licence to take them (m).—A licence may be exclusive of the owner and of any other person; or it may admit of similar licences being granted to others not inconsistent with the former. A licence to take minerals is presumptively not exclusive, and is so construed in the absence of intention expressed to the contrary (n). "A man taking a licence when he is under no obligation to work cannot exclude his licensor from granting as many more of those licences as he thinks fit; provided always, that they are not so granted as to defeat the known objects of the first licensee in applying for his licence" (o).—The licensee of an exclusive right to take minerals, who has opened a mine in exercise of his right, may maintain an action of trespass

Exclusive licence.

Remedy of licensee.

(l) Per cur., Rogers v. Brenton, 10 Q. B. 56; ib., note at p. 65. (m) Proud v. Bates, 34 L. J. C. 406; Duke of Hamilton v. Graham, L. R. 2 Sc. Ap. 166; per cur., Ballacorkish Mining Co. v. Harrison, L. R. 5 P. C. 62; Wiekham v.

Hawker, 7 M. & W. 63; Dee v. Lock, 2 A. & E. 743.
(n) Mountjoy's Case, Co. Lit. 164 b, 1 And. 307; Godb. 17; Chet-

L. R. 5 P. C. 62; Wickham v.

ham v. Williamson, 4 East, 469.
(c) Wood, L. J., Carr v. Benson,
L. R. 3 Ch. 532.

and of ejectment, in respect of his actual possession of the mine, against a wrongdoer; though he have not the exclusive possession in other respects (p). The mere licence without possession taken in exercise of it would not be sufficient to maintain such action (q).

The right to minerals separate from the surface, whether Relative by grant, reservation, or licence, necessarily implies the rights of owners of power to get them; and, therefore, the right of using the surface and surface so far as is reasonably necessary for the purpose of minerals. getting the minerals in the proper and usual manner; according to the maxim "quando aliquid conceditur, conceditur etiam id sine quo res ipsa esse non potest." any interference with or injury to the surface beyond what is reasonably necessary, whether wilful or negligent, the owner of the minerals is liable to the surface owner. Generally the relative rights of the parties are regulated by the deed or instrument of grant or licence creating the separate rights; and then the only question is as to the construction of the deed (r).—The right of support for the Right of surface by the subjacent minerals is of the nature of an support. easement, and is treated hereafter under the title of Easements (s).

A lease of minerals or a licence to take minerals for a Lease of term of years is equivalent to a sale out and out of so minerals. much of the soil itself as consists of the minerals to be taken; and the rent reserved upon a mineral lease is not like an ordinary rent or reservation of annual profits, but it is in effect a payment by instalments of the price of the minerals sold. It is usual to reserve it in the form of a royalty, that is, a proportion of the minerals worked or of

<sup>(</sup>p) Harker v. Birkbeck, 3 Burr. 1556; 1 W. Bl. 482; per cur., Rogers v. Brenton, 10 Q. B. 52. (q) Per cur. Doe v. Wood, 2 B. & Ald. 737; Doe v. Alderson, 1 M. & W. 210.

<sup>(</sup>r) Lord Wensleydale, Rowbo-tham v. Wilson, 8 H. L. C. 360; 30 L. J. Q. B. 53; Blackburn, J., Smith v. Darby, L. R. 7 Q. B. 722; 42 L. J. Q. B. 140. (s) See post, p. 236.

their value. "A mineral lease or a lease of mines is not

in reality a lease at all in the sense of an agricultural lease. There are no periodical harvests. A mineral lease is really a sale out and out of a portion of land" (t). The exhaustion of the minerals within the term demised. leaving no further enjoyment or profit in the lessee, is equivalent to a determination of the lease; and the unexpired residue of the term may be disregarded. Upon a subsequent conveyance of the land with the usual covenants for title, an exhausted but unexpired mining lease was held to be no incumbrance upon the title nor any breach of the covenants (u). So, where the lessee of minerals, part of which lay under a railway, had been compensated for such part to the full value by the railway company under their statutory powers, and he afterwards surrendered his lease to the reversioner; it was held that the reversioner retained no further right to work the minerals for which the compensation had been paid (x).— Upon this principle of a lease of minerals operating as an absolute sale of the minerals demised, the lessee becomes entitled to recover the full value of minerals wrongfully severed and taken by a stranger during the term; at the same time remaining liable to his lessor for the rent covenanted in the lease (y). The damages for a wrongful taking of minerals are, in general, assessed at the full value of the separated minerals, without allowing for the costs of the wrongful acts of severance and working. Where, however, the wrongful working has occurred bonâ fide, through mistake or inadvertence, the costs of working have been allowed against the full value (3).

Right of lessee to the minerals.

<sup>(</sup>t) L. Cairns, Gowan v. Christie, L. R. 2 Sc. Ap. 284; L. Blackburn, Collness Iron (v. v. Black, L. R. 6 Ap. Ca. 335; Bramwell, B., Eadon v. Jeffcock, L. R. 7 Ex. 394.

<sup>(</sup>u) Spoor v. Green, L. R. 9 Ex. 99; 43 L. J. Ex. 57.

<sup>(</sup>x) Smith v. Great Western Ry. Co., L. R. 3 Ap. Ca. 165; 47 L. J. C. 97

<sup>(</sup>y) Attersoll v. Stevens, 1 Taunt. 183.

<sup>(</sup>z) Martin v. Porter, 5 M. & W. 351; Jegon v. I'wian, L. R. 6 Ch. 742; 40 L. J. C. 389; Trotter v. Maclean, L. R. 13 C. D. 574; 49 L. J. C. 256; Livingstone v. Ravyard's Coal Co., L. R. 5 Ap. Ca. 25; Taylor v. Mostyn, L. R. 33 C. D. 226; 55 L. J. C. 893.

Tenant for life or for years impeachable for waste, Right of cannot, in general, take any minerals or materials from the or years to land except so far as may be reasonably necessary for the minerals. repair and maintenance of the property. "Digging for gravel, lime, clay, brick-earth, stone or the like; or for mines of metal, coal or the like hidden in the earth that were not open when the tenant came in, is waste. But the tenant may dig for gravel or clay for the reparation of the house, as well as he may take convenient timber trees" (a). As tenant in possession he can prevent the reversioner or any other person from taking minerals; for his possession extends to everything below the surface. Therefore during his tenancy minerals can only be worked with his consent (b). —Tenant for life "without impeach- Tenant withment of waste" may take minerals or any materials from out impeachment for the land for his own use to the exhaustion of the inherit- waste. ance; provided he does not exercise his right in such an unreasonable manner as would be considered equitable waste (c). Consequently minerals wrongfully taken from the land during his tenancy become vested in him, and he is entitled to recover such minerals or their value. Where coal had been taken by trespassing from an adjacent mine, during two successive tenancies for life without impeachment of waste, it was held that compensation paid for the coal taken belonged to the estates of the tenants for life in proportion to the quantities taken during their respective tenancies (d). So with minerals taken by a railway company under the Lands Clauses Act, the compensation payable belongs to the then tenant for life without impeachment of waste, if he could possibly have taken the minerals during his tenancy (e).

If land containing open mines, stone quarries, gravel Open mines. pits, brickfields, or other workings of the like kind, be

<sup>(</sup>d) Re Barrington, L. R. 33 C. D. 523; 56 L. J. C. 175. (a) Co. Lit. 53 b; ante, p. 36. (b) Lewis v. Braithwaite, 2 B. & (e) Re Barrington, supra. Ad. 437.

<sup>(</sup>c) Ante, p. 23.

demised to a tenant for life or for years, without express restriction of the use, the tenant, though in other respects impeachable for waste, is entitled to continue the working and take the profits for his own use; because it is the presumed intention that the lessee shall take the profits of the land in the condition in which it is demised to him(f). "If there be open mines, and the owner make a lease of the land with the mines therein, this shall extend to the open mines only; but if there be no open mines and the lease is made of the land, together with all mines therein, then the lessee may dig for mines and enjoy the benefit thereof, otherwise those words should be void" (g). An assignee or underlessee of the term has no greater right in this respect than the original lessee; and if it is waste in the lessee to open mines, it is waste in his assignee to continue to work them (h).—Upon the same principle the devisee for life of land containing open mines is entitled to continue to work them for his own use, for "the author of the gift has made them part of the profits of the land"; but he is not entitled to open new mines (i). Tenant in dower, as being tenant for life in one-third of the inheritance, is entitled to work open mines as part of the profits of the land; she cannot open new mines without committing waste, but she can prevent the opening of them by others during her tenancy (k). The incumbent of a living, holding glebe land as tenant for life, may work mines previously opened; but he may not open new mines and take minerals; nor does the consent of the patron render his doing so lawful; and it is doubtful whether the further consent of the ordinary would entitle him to do so (1). Where land was demised for a term of years by way of

<sup>(</sup>f) L. Blackburn, Campbell v. Wardlaw, L. R. 8 Ap. Ca. 641.
(g) Co. Lit. 54 b; Saunders' Case,

<sup>5</sup> Co. 12a; Astry v. Ballard, 2 Mod. 193.

<sup>(</sup>h) Saunders' Case, 5 Co. 12 b.
(i) Viner v. Vanghan, 2 Beav.

<sup>466;</sup> Miller v. Miller, L. R. 13 Eq. 263; 41 L. J. C. 291.

<sup>(</sup>k) Stoughton v. Leigh, 1 Taunt. (l) Holden v. Weekes, 1 J. & H. 278; 30 L. J. C. 35.

mortgage, and the mortgagor, who was owner of the inheritance, remaining in possession opened new mines, the mortgagee, on subsequently taking possession, was held entitled to work the new mines opened since his mortgage, as forming part of his security (m).—Upon the same principle the tenant for life of settled land which is let on mining leases at the time of making the settlement is held entitled to take the rents and royalties payable in respect of the minerals gotten, "though they are really instalments of the purchase-money of part of the inheritance" (n). Where tenant in tail of settled land opened mines and died without issue, the tenant for life in remainder was held entitled to continue the working of the mines during his possession (o).

Whether a working for mineral or material is to be What are considered an "open mine," which a tenant impeachable open mines. of waste may work for his own use, depends upon the purpose for which it was opened. "If a mine or quarry has been worked for commercial profit, that must ordinarily be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used for some definite and restricted purpose, (e.g. for the purpose of fuel or repair to some particular tenements,) that would not, alone, give any such right. But if there has been a working and use of minerals not limited to any special or restricted purpose, there appears nothing to justify the introduction of sale, as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. Use, as well as sale, is a perception of profit" (p). Mere preparations made for opening a mine are not sufficient to entitle a

<sup>(</sup>m) Elias v. Snowdon Slate Quarries Co., L. R. 4 Ap. Ca. 454; 48 L. J. C. 811.

<sup>(</sup>n) Miller v. Miller, L. R. 13 Eq. 263; 41 L. J. C. 291. Jessel, M. R. Brigstocke v. Brigstocke, L. R. 8 C. D. 363; 47 L. J. C.

<sup>(</sup>o) Clavering v. Clavering, 2 P.

Wms. 389. (p) L. Selborne, Elias v. Snowdon Slate Quarries Co. L. R. 4 Ap. Ca. 465; 48 L. J. C. 811.

succeeding tenant for life to complete the opening and work the mine (q). And opening mines in part of the land is not equivalent to opening similar mines throughout (r). But the sinking of a new mine in the same vein of minerals, or breaking ground in a new place in the same quarry, is not necessarily a new opening; it may be merely a continuation of the former working (s). So the right of taking gravel from a pit implies the right of taking it from the sides of the pit, so as to extend the pit laterally (t). Upon this principle "the whole of the gravel or sand upon the waste land of a manor may be treated as one mine, and each gravel pit as if it were a fresh pit in the mine," and the profits will belong as income to the tenant in possession (u). A mine that has been abandoned merely because it could not at the time be worked at a profit may still be considered an open mine. But a mine that has been abandoned by the owner of the inheritance, with the view to some permanent advantage to the property, would, in general, be no longer considered an open mine (x). And a tenant for life would not be entitled to re-open a mine that had been abandoned before his coming into possession (y).—The expression "winning" minerals, which is frequently used in mining leases and licences to denote the condition upon which the mine is to be treated as open for profit and for payment of royalty, is construed to mean that the mine is put in a state capable of continuous working in the ordinary way, after completing the preliminary works necessary for reaching the mineral, draining the mine and making it practically workable (z).

Winning minerals.

<sup>(</sup>q) Viner v. Vaughan, 2 Beav.

<sup>(</sup>r) L. Blackburn, Campbell v. Wardlaw, L. R. 8 Ap. Ca. 647.

<sup>(</sup>s) Elias v. Snowdon Quarry Co., L. R. 4 Ap. Ca. 454; 48 L. J. C. 811; Clavering v. Clavering, 2 P. Wms. 388.

<sup>(</sup>t) Ellis v. Bromley Local Board, 45 L. J. C. 763.

<sup>(</sup>u) Cowley v. Wellesley, L. R. 1 Eq. 659; 35 Beav. 635.

<sup>(</sup>x) Bagot v. Bagot, 32 Beav. 509; 33 L. J. C. 116.

<sup>(</sup>y) See Viner v. Vaughan, 2 Beav.

<sup>(</sup>z) Hatherley, L. C. Lewis v. Fothergill, L. R. 5 Ch. 111; Rokeby v. Elliot, L. R. 13 C. D. 277; 7 Ap Ca. 43.

Where land is settled and the tenant for life is impeach- Mines opened able of waste, and therefore unable to work minerals, the by order of Court. Court exercises a jurisdiction to order or sanction the opening of mines and working of minerals for the benefit of the property and of all parties interested; in the same manner as with the cutting of timber. In such cases the Court will direct the proceeds to be sold and invested, and the annual income to be paid to the persons coming into possession in succession under the settlement, including the tenant for life. And the fund will ultimately vest absolutely in the first person who becomes entitled under the settlement to an estate unimpeachable of waste, whether for life or in fee, which would entitle him to take the minerals for his own use (a). The same principle applies By trustees presumptively to the proceeds of leases of minerals granted under powers of leasing. by the trustees of settled land under powers of making mining leases. "As between a tenant for life and remainderman, money paid by a lessee as the price of land won and carried away and sold by the lessee in the shape of minerals, stones or bricks, is always treated as capital and not as income, unless the settlor has expressed an intention to the contrary by making the tenant for life unimpeachable for waste, or by some other expression; or unless at the time of the settlement the mines let were open, in which case an intention to the contrary is inferred, if consistent with the language of the settlement" (b). Where land with "the mines and minerals" was settled, and power was given to the trustees to lease the minerals, it was held that the intention was shown that the mines and minerals should be part of the profits, and that the rents and royalties reserved were payable to the tenant for life, and did not form capital (c). Under a settlement which vested the settled land in trustees, upon trust to pay

<sup>(</sup>a) Ante, p. 40; Bagot v. Bagot, 32 Beav. 509; 33 L. J. C. 116.
(b) Per cur. Re Ridge, Hellard v.

L. J. C. 265; Campbell v. Ward-law, L. R. 8 Ap. Ca. 641. (c) Daly v. Beckett, 24 Beav. Moody, L. R. 31 C. D. 508; 55

"the whole annual produce and rents" to a tenant for life, it was held that there was no intention shown to include the rents of mines leased by the trustees subsequently to the settlement under statutory powers, which must therefore be treated as capital of which the tenant for life could only claim the interest (d).

Mining lease under Settled Land Act.

Under the Settled Land Act, 1882, s. 6, a tenant for life of settled land, within the definitions of the Act, may grant a mining lease for a term not exceeding sixty years; and by sect. 2 a "mining lease" includes "a grant or licence for any mining purposes." By sect. 7 the lease must reserve the best rent that can reasonably be obtained; and by sect. 9 the rent may be made ascertainable according to the acreage worked or according to the quantities of any mineral gotten. By sect. 11, "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely, where the tenant for life is impeachable for waste in respect of minerals, threefourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue shall go as rents and profits."—A tenant for life of the proceeds to arise from the sale of settled land under a trust for conversion in the settlement, was held to be in the position, in relation to the land before sale, of a tenant "impeachable for waste in respect of minerals," within this section, and therefore entitled to take only one-fourth of the rent of a newlyopened mine as current rents and profits (e).

Minerals in copyholds.

By the general custom of copyhold tenure the lord of the manor retains the minerals, not by a partition of the tenement, but as freeholder of the whole tenement, including

<sup>(</sup>d) Campbell v. Wardlaw, L. R. (e) Re Ridge, L. R. 31 C. D. 508; 8 Ap. Ca. 641. 55 L. J. C. 265.

the minerals, the copyhold tenant having the possession only. But the possession of the copyholder extends over the whole tenement and all that it contains above and below the surface, including the minerals. The estate of the copyholder, as tenant at will secured by the custom, does not entitle him to commit waste by taking minerals, or any part of the soil itself. On the other hand, the lord, without a special custom, has no right of entering upon the possession of the tenant to take the minerals or any part of the soil, although the freehold title remains in him (f).—Accordingly, stones lying upon the surface of a copyhold tenement presumptively belong to the lord; and the copyholder, though entitled to the possession, is not entitled to appropriate and dispose of them to his own profit (g).—If the lord wrongfully enter and take any part of the soil or minerals, the copyholder in fee who has the absolute title to the possession and to prevent their removal, becomes entitled to recover the full value of the soil or minerals taken, less the cost and fair profit of the working(h).

By special custom of a manor the copyhold tenants may Special have the right, absolute or qualified, of getting and taking customs. away for their own property the minerals under their respective tenements; as they may have by special custom the right of cutting the timber growing upon their tenements. The custom may extend to certain kinds of minerals only, as coal, sand, clay, gravel, brick-earth, or any other mineral (i). So by special custom of a manor the lord may have the right of entering upon the possession

(h) Att.-Gen. v. Tomline, L. R.

Ca. 307.

<sup>(</sup>f) Lewis v. Braithwaite, 2 B. & Ad. 437; Keyse v. Powell, 2 E. & B. 132; Bowser v. Maclean, 2 D. F. & J. 420; 30 L. J. C. 273; Jessel, M. R. Eardley v. Granville, L. R. 3 C. D. 832; 45 L. J. C. 672.

<sup>(</sup>g) Dearden v. Evans, 5 M. & W. 11. See Tucker v. Linger, L. R. 21 C. D. 18; 51 L. J. C. 713, cited post, p. 68.

<sup>5</sup> C. D. 750; 46 L. J. C. 654. (i) Salisbury v. Gladstone, 9 H. L. C. 692; 34 L. J. C. P. 222; Hanner v. Chance, 4 D. J. & S. 626; 34 L. J. C. 413; Portland v. Hill, L. R. 2 Eq. 765; 35 L. J. C. 439; Att.-Gen. v. Mylchreest, L. R. 4 Ap.

of the tenant to work the minerals (k). The custom may be for the lord to take one kind of mineral and the tenants another (l). The onus of proving the special custom lies upon the party claiming the benefit of it (m).

Minerals in freeholds of manor.

As between the lord and the freeholders of a manor the property in the minerals depends upon the terms of the grant. Where the original grant does not appear, as is generally the case, the presumption is that the minerals form part of the freehold and pass with the freehold tenement. But they may have been separated and reserved to the lord; and a partition of this kind throughout a manor may be proved by evidence of the practice of the lord to work minerals from time to time under land of freeholders within the boundaries of the manor (n).

Minerals in waste.

The minerals in the uninclosed wastes of the manor, which are not in the occupation of tenants, belong to the lord in immediate possession; and he may therefore work them in right of his ownership of the soil, subject to rights of common or other customary or acquired rights of tenants of the manor over the surface, if any such rights can be proved to exist. The lord has the right to every use and profit to be derived from the wastes, the taking of which is not inconsistent with the rights of commoners or others: and the burden of proof lies upon those who complain that in exercising his rights of ownership, he interferes with their rights (o).—Upon inclosure of wastes under Inclosure Acts, it is a frequent practice to sever the minerals from the surface rights, by reserving them to the lord, and allotting the surface in separate freehold tenements (p). Under such inclosures the reservation to the lord is in general to be construed with reference to his former abso-

Inclosure of waste.

<sup>(</sup>k) Eardley v. Granville, L. R. 3 C. D. 826; 45 L. J. C. 669.

<sup>(1)</sup> Curtis v. Daniel, 10 East, 273.

<sup>(</sup>n) Portland v. Hill, supra. (n) Barnes v. Mawson, 1 M. & S. 77; see Taylor v. Parry, 1 M. & G. 604.

<sup>(</sup>o) Hall v. Byron, L. R. 4 C. D. 667; 46 L. J. C. 297.

<sup>(</sup>p) Pretty v. Solly, 26 Beav. 606; Duke of Buccleuch v. Wake-field, L. R. 4 H. L. 377; 39 L. J. C. 441,

lute title to the soil and to everything constituting the soil; it is therefore held to include every part of the soil that can be worked consistently with the surface rights of the allottees (q). And where an Inclosure Act reserved all mines and minerals to the lord as fully as before the Act, with a special provision for restoring the surface after getting the minerals, it was held to reserve building stone got by quarrying from the surface (r).

With respect to minerals lying under or near railways, Minerals it is provided by the Railways Clauses Act, 8 Vict. c. 20, under railways. s. 77, that the railway company shall not be entitled to any mines or minerals under any land purchased by them, except only such parts thereof as shall be necessary to be carried away or used in the construction of the works; unless the same shall have been expressly purchased and conveyed. By s. 78 if the owner, lessee, or occupier of any mines or minerals lying under or near the railway be desirous of working the same, he shall give to the company notice in writing of his intention to do so thirty days before the commencement of working, and if the company be willing to make compensation, he shall not work or get the same (s). By s. 79 if the company be not willing to treat for the payment of such compensation, the owner may work the mines in the proper and usual manner in the district. And in the latter event he will not be liable for any damage done to the railway from the proper working of the mines according to the Act(t). Under these sections the vendor of the land purchased by the railway company retains only the right to get the minerals,

<sup>(</sup>q) Rosse v. Wainman, 14 M. & W. 859; Hext v. Gill, L. R. 7 Ch. 699; 41 L. J. C. 763.
(r) Rosse v. Wainman, supra.

<sup>(</sup>s) Midland Ry. v. Robinson, L. R. 37 C. D. 386; 57 L. J. C. 441. (t) Great Western Ry. v. Bennett, L. R. 2 H. L. 27; 36 L. J. Q. B.

<sup>133;</sup> Dixon v. Caledonian Ry., L. R. 185; Pixon V. Cateannian Ry., L. R. 5 Ap. Ca. 820; Errington v. Metrop. Distr. Ry., L. R. 19 C. D. 559; 51 L. J. C. 305. Brett, M. R. Pountney v. Clayton, L. R. 11 Q. B. D. 835; 52 L. J. Q. B. 568. See Re Holliday and Wakefield, L. R. 20 Q. B. D. 699.

Surface minerals. without any estate or interest in the land itself containing them; the space occupied by the minerals belongs to the company (u).—The mines and minerals reserved by the above Act to the vendor of the land includes surface minerals that may be got by open workings as well as the minerals got by underground working; the section 77 excepting only such parts thereof as are necessary to be dug and carried away in the construction of the works. Consequently the vendor may proceed to work a bed of brick, fire-clay, slate or stone upon which the railway is made, unless the company are willing to make compensation for it (x).—Sect. 80 enables the owner of minerals, to which the access is cut off by a railway company having purchased the minerals lying under their line, to work the minerals by tunnelling under the railway. And sect. 81 provides that the company shall compensate the owner of the minerals for all such additional expenses and losses as shall be incurred by him by reason of the severance of the minerals, or of their being worked in such a manner as not to injure the railway, and for any minerals which cannot be obtained by reason of the railway (y).

Superfluous land.

Minerals underlying land purchased by a railway company which are not required for the support of the surface or other purposes of the railway, are not within the description of "superfluous land" in the Lands Clauses Act, 8 & 9 Vict. c. 18, s. 127, which requires the company to sell all such superfluous land within ten years of the completion of the works, and in default of sale vests such land in the owners of the lands adjoining thereto. superfluous land intended by the Act is such portion of the land purchased as is superfluous, having regard to the

(u) Jessel, M.R. Re Metrop. Distr. Ry. and Cosh, L. R. 13 C. D. 614. (x) Midland Ry. v. Haunchwood Brick Co. L. R. 20 C. D. 552; 51 L. J. C. 778; Midland Ry. v. Miles, 55 L. J. C. 745; L. R. 33 C. D. 632; Midland Ry. v. Robinson, L. R. 37 C. D. 386; 57 L. J. C. 441. See

Glasgow v. Farie, Weekly Notes, 1888, p. 192. (y) Whitehouse v. Wolverhampton Ry. L. R. 5 Ex. 6; 39 L. J. Ex. 1; Midland Ry. v. Miles, L. R. 30 C. D. 634; 55 L. J. C. 251, 745; Mid-land Ry. v. Miles, L. R. 33 C. D. 632; 55 L. J. C. 745.

Severance of access to

minerals.

use of the surface; it is to be separated by a vertical section of the land, and does not apply to the portion that may be separated by a horizontal section, either below the line of railway as in the case of mines and minerals, or above the line, where it is carried below the surface in a tunnel (z).—Land that has been taken compulsorily without the minerals and afterwards sold as superfluous land carries with it no further rights, in regard to the minerals and the mode of working them, than the railway company had; consequently, as the owner of the minerals would not have been liable to the railway company for damage to the surface caused in the usual and proper working of the minerals, so he will not be liable for such damage to a purchaser of the superfluous land from the company (a).

The general term "minerals" includes "every substance Construction which can be got from underneath the surface of the earth "minerals"; for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning" (b). Accordingly, a reservation of "minerals" from a grant of land, includes "everything except the mere surface, which is useful for any purpose whatever," as gravel, sand, fireclay or the like; also every species of stone, as marble, limestone, ironstone, freestone (c). Clay used for puddling or for brick making is a mineral within the Railways Clauses Act, 1845, s. 77, which reserves the minerals to the vendor, upon a purchase of land by a railway company under their compulsory powers (d). China clay under a

<sup>(</sup>z) Re Metrop. Distr. Ry. v. Cosh, L. R. 13 C. D. 607; 49 L. J. C. 277. See Cairns, L. C. Hooper v. Bourne, L. R. 5 Ap. Ca. 1; 49 L. J. Q. B. 370; Rosenberg v. Cook, 51 L. J. Q. B. 170.

<sup>(</sup>a) Pountney v. Clayton, L. R. 11 Q. B. D. 820; 52 L. J. C. 566. (b) Mellish, L. J. Hext v. Gill, L. R. 7 Ch. 712; 41 L. J. C. 763; Fry, J. A.-G. v. Tomline, L. R. 5 C. D. 762; 46 L. J. C. 654.

<sup>(</sup>e) Romilly, M. R. Midland Ry. v. Checkley, L. R. 4 Eq. 25; 36 L. J. C. 380; Bell v. Wilson, L. R. 1 Ch. 303; 35 L. J. C. 337; Rosse v. Wainman, 14 M. & W. 859; 2 Ex. 800; Micklethwait v. Winter, 6 Ex. 644; 20 L. J. Ex. 313.

<sup>(</sup>d) Loosemore v. Tiverton Ry., L. R. 22 C. D. 25; 51 L. J. C. 570: Midland Ry. Co. v. Haunchwood Brick Co., L. R. 20 C. D. 552; 51 L. J. C. 778.

copyhold tenement is included in the minerals to which the lord of the manor is entitled; his claim extending to minerals in the most general sense of the word. "There is nothing to be got out of the soil and sold for a profit which the copyhold tenant, in the absence of some special custom, is entitled to get without the permission of the lord; the property of it is in the lord, although, in the absence of special custom, the lord cannot get it without the licence of the tenant" (e). So, beds of coprolites belong to the lord (f). Flints turned up in ploughing are minerals which primû facie belong to the landlord; but by local agricultural custom the tenant may be entitled to pick them off the land and sell them (g).

"mines" and "quarries."

The term "mine" is used in the primary meaning for an underground working without removing the surface, in distinction to an open working or "quarry;" the meaning being determined by the context and the circumstances in which the term is used (h). It is also used for the stratum or vein of mineral worked. By a grant of "mines" or "mines of lead," the soil itself prima facie passes, and not merely the right of digging in the soil and taking minerals (i). A grant of "coals" or "coal mines" carries with it the strata of coal, but not the intermediate strata of different minerals; except that the grantee may remove so much of the adjacent strata as is necessary for working the strata granted, and he may dispose of the material so removed for his own use and profit. So, the spoil banks made in the proper working of a mine become appurtenants of the mine and pass with it, as also the shafts of the mine (k). A lease of "workable coal seams"

<sup>(</sup>e) Hext v. Gill, L. R. 7 Ch. 712; 41 L. J. C. 763. (f) A.-G. v. Tomline, L. R. 5 C. D. 750; 46 L. J. C. 654.

<sup>(</sup>g) Tucker v. Linger, L. R. 21 C. D. 18; 51 L. J. C. 713. (h) Turner, L. J. Bell v. Wilson, L. R. 1 Ch. 308; 35 L. J. C. 340; Kindersley, V.-C. Cleveland v. Mey-

rick, 37 L. J. C. 128; Jones v. Cwmorthen Slate Co., L. R. 4 Ex. D. 97; 5 ib. 93; 49 L. J. Ex. 110. (i) Co. Lit. 6 a; Shepp. Touchst. 96.

<sup>(</sup>k) Ramsay v. Blair, L. R. 1 Ap. Ca. 704; Robinson v. Milne, 53 L. J. C. 1074.

was construed to mean such coal seams as were workable at a profit, and therefore to include such seams of coal as containing ironstone would produce a profit by being worked together with the ironstone (l).

The words "mines and minerals" as commonly used Mines and in combination in a grant or reservation, are not to be minerals. construed as restricting the meaning to such materials only as can be got by the process of mining strictly so called; they prima facie include minerals in the general meaning of the term, together with the right of working them in the manner proper to each kind (m). A reservation in a Canal Act to the landowners of "all mines and minerals within or under the land" was construed to include every species of mineral within the land whether got by underground or by surface working (n). But a grant of land with a reservation of "mines and minerals within and under the land" was construed strictly as referring to underground workings only, and not permitting the quarrying of freestone from the surface (o). A partition of land, excepting the "mines and minerals" and providing that they should continue to be held in common, was construed as excepting from partition only such minerals as could be got by mining in the sense of underground working; and that the surface minerals got by quarrying, such as limestone, passed in severalty under the partition; otherwise there would remain nothing unexcepted for the partition to operate upon (p). A building lease excepting the minerals, and containing express conditions for building, impliedly carries with it the right to dig and remove so much of the surface minerals as is necessary to make the foundations of the buildings, and the lessee may dispose of the material so removed; but it gives no right

<sup>(1)</sup> Carr v. Benson, L. R. 3 Ch.

<sup>(</sup>m) Mellish, L. J. Hext v. Gill, L. R. 7 Ch. 712; 41 L. J. C. 761.

<sup>(</sup>n) Midland Ry. v. Checkley, L. R.

<sup>4</sup> Eq. 25; 36 L. J. C. 380. (o) Bell v. Wilson, L. R. 1 Ch. 303; 35 L. J. C. 337. (p) Darvill v. Roper, 3 Drew. 294; 24 L. J. C. 779.

to dig or move the surface for the purpose of improving it as a building site, or for the purpose of brick making (q). -In the Railways Clauses Act above referred to, the "mines" excepted out of a conveyance of land to a railway company include minerals of all kinds whether forming part of the surface or lying underground, and carry the right of working in the usual way, whether by mining or by open workings (r). In the Settled Land Act, 1882, 45 & 46 Vict. c. 38, s. 2, (10, iv), mines and minerals are defined to mean "mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working." In the Quarry Fencing Act, 1887, 50 & 51 Vict. c. 19, s. 4, "The term 'quarry' includes every pit or opening made for the purpose of getting stone, slate, lime, chalk, clay, gravel, or sand, but not any natural opening."

Royal mines of gold and silver. By the common law "all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents as are necessary to be used for the getting of the ore." Also if gold or silver be in ores or mines of copper, tin, lead, or other base metal in the soil of subjects, "as well the base metal as the gold and silver in it belongs by prerogative to the Crown; with liberty to dig for it and to carry it away; and in such case it shall be called a mine royal." "And this is the reason that the law doth give to the King mines of gold and silver, thereof to make money" (s). The statutes 1 Will. & M. st. 1, c. 30, and 5 Will. & M. c. 6, amended by 55 Geo. III. c. 134, enacted that no mine of copper,

<sup>(</sup>q) Robinson v. Milne, 53 L. J. C. 1072.

<sup>(</sup>r) See ante, p. 66 (x).

<sup>(</sup>s) Case of Mines, Queen v. Earl Northumberland, Plowden, 336; 2 Co. Inst. 577; Rogers v. Brenton, 10 Q. B. 48.

tin, iron, or lead shall be adjudged a royal mine, although gold or silver may be extracted out of the same in any quantities; provided that the King may have the ore of such mines, paying for the same at a rate therein stated. The prerogative of royal mines gives no power to enter into the land of a subject to search for them, or to grant licence to any person to do so; but when they are once opened, the Crown can restrain the owner from working them, and can either work them itself, or grant a licence for others to work them (t). "A mine royal may Grants of by the grant of the King be severed from the Crown, and royal mines. be granted to another, by apt and precise words." grant by the Crown of "land" or of "mines" is construed strictly, as exclusive of royal mines, unless there be precise words to express them. But a grant by the Crown of all mines in certain land will pass royal mines, if there be no other mines of the Crown in the land to which the grant can apply, otherwise the grant would be void of effect (u).

"Treasure trove is when any gold or silver, in coin, Treasure plate or bullion, hath been of ancient time hidden. trove. whereof no person can prove any property; wheresoever it be found, it doth belong to the King, or to some lord or other by the King's grant, or prescription." "Whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins, or elsewhere, so as the owner cannot be known." If it be of any other metal than gold or silver, it is no treasure and belongs not to the King (x). A chattel, not being treasure, found in the soil, whereof no person can prove any property, primâ facie belongs to the owner of the soil; as an ancient boat found in excavating beneath the surface. And a lease of the land for building with the right of excavating and removing the soil for the foundations of

<sup>(</sup>t) Hardwicke, L. C. Lyddal v. Weston, 2 Atk. 20.

<sup>(</sup>u) Case of Mines, Plowden, 336, 337; Woolley v. A.-G. of Victoria,

L. R. 2 Ap. Ca. 163; 46 L. J. P. C. 18.

<sup>(</sup>x) 3 Co. Inst. 132; 1 Blackst. Com. 195.

the buildings, was held not to pass the property in such a chattel to the lessee, who found it in the course of excavation; there being no intention in the lease to pass it with the soil (y). Chattels, not being treasure, found on the surface or elsewhere than in the soil, whereof no property can be proved, belong prima facie to the finder in right of his possession (z); except that wreck or chattels cast upon land by the sea, whereof no owner can be found, belong to the Crown by prerogative, or in some cases to the lord of a manor as grantee, express or prescriptive, of the Crown (a).

Prerogative of saltpetre.

There is also a prerogative in the Crown to dig and take saltpetre wherever found, to make gunpowder, which is a branch of the general prerogative for the defence of the realm. It differs from the prerogative of gold and silver in not attributing to the Crown any assignable property in the mineral, but only the right of taking it for a definite purpose (b).

Public rights of mining by custom.

In some districts there are public rights of mining founded upon custom; as the custom of tin bounding prevailing in Cornwall, and the customs prevailing in the Forest of Dean, and in the district of the Peak in Derby-There customary rights are now for the most part regulated by statutes (c).

(c) See post, p. 563.

<sup>(</sup>y) Elwes v. Brigg Gas Co., L. R.33 C. D. 562; 55 L. J. C. 734.

<sup>(</sup>z) Armory v. Delamirie, Strange, 505; 1 Smith's L. C.; Merry v. Green, 7 M. & W. 623.

<sup>(</sup>a) 2 Co. Inst. 166; post, p. 172. (b) Case of Prerogative of Saltpetre, 12 Co. 13.

## CHAPTER VI.

## GAME AND WILD ANIMALS.

Property in game and wild animals—trespass in pursuit of game. Game laws-penalties on trespasser-on occupier-game definednoxious animals-tame animals.

Right to game as separate property—contracts relating to taking game—Ground Game Act—licence to sport.

Construction of grants and leases as to the game-inclosure awards. Rating of game as a separate tenement.

Forests-forest law-charter of the forest-chase-park-warrengrant of manor with warren.

Land carries with it, as an incident of possession, the Property in right of capturing the game and other wild animals found game and upon it; but there is no property in such animals until reduced into possession. "When it is said by writers in the common law, that there is a qualified or special right of property in game, that is, in animals feræ naturæ which are fit for the food of man, the word 'property' can mean no more than the exclusive right to catch and appropriate such animals, which is called by the law a reduction of them into possession. This right is said in law to exist ratione soli or ratione privilegii. Property ratione soli is the common law right which every owner of land has to take all such animals fere nature as may from time to time be found on his land; and as soon as this right is exercised the animal so caught becomes the absolute property of the owner of the soil. Property ratione privilegii is the right which by a peculiar franchise anciently granted by the Crown, by virtue of prerogative, one man may have of taking animals feræ naturæ on the land of another; and in

like manner the game when taken by virtue of the privilege becomes the absolute property of the owner of the franchise "(a).

Trespass in pursuit of game.

If a person find game upon his own land and pursue and take it upon the land of another, it becomes his property, by reason of his original right of capture; the pursuit and capture of the wild animal being considered as one continuous act; but the entry upon the land of another, without his leave, is a trespass, which is not justified by the pursuit of the game (b). If the game be both found and taken by a trespasser upon the land of another person, it becomes the property of the owner of the land, ratione soli,—as if it had been taken by himself or by his authority (c). And so, it seems, if game be found by a trespasser on the land of one person, and taken by him on the land of another person, it becomes the property of the person on whose land it was found, ratione soli (d). Similarly if a trespasser started game in a franchise of forest or warren and pursued and took it beyond the boundaries of the franchise, the privilege followed the game, and it became the property of the owner of the franchise (e). Where a person hunting with hounds in the usual manner over the lands of others found a hare on the land

(a) Westbury, L. C. Blades v. Higgs, 34 L. J. C. P. 288; 11 H. L. C. 621.

(b) Manwood, Forest Law, pp. 387, 392, citing Year Book, 12 H. 8, 10; Kenyon v. Hart, 6 B. & S. 249; 34 L. J. M. 87.

(c) Blades v. Higgs, supra; Lonsdale v. Rigg, 1 H. & N. 923; 26 L. J. Ex. 196. (d) "If A. start a hare in the

(d) "If A. start a hare in the ground of B., and hunt and kill it there, the property continues all the while in B.; but if A. start a hare in the ground of B., and hunt it into the ground of C., and kill it there, the property is in A. the hunter: but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C." Holt, C. J. Sutton v. Moody, 1 L.

Raym. 250; adopted in 2 Blackst. 419. But as to the second of the above propositions "it would appear to be more in accordance with principle to hold, that if the trespasser deprived the owner of the land where the game was started of his right to claim the property, by unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that owner and not for himself; the first proposition with respect to game started and killed on the land of the same owner is free from all difficulty." L. Chelmsford, Blades v. Higgs, supra.

(e) Holt, C. J. Sutton v. Moody, 1 L. Raym. 250; L. Westbury, L. C. Blades v. Higgs, supra. of one person, and killed it upon the land of another, who claimed the dead hare, it was held to be the property of the hunter; who may be taken to have had the licence of the owner of the land where he found the hare, according to the usual custom of hunting; he would therefore have the rights of the owner in claiming the hare (f). For the sport of hunting, as usually pursued, can be justified only upon the ground of the consent, either expressly given or tacitly assumed, of all the occupiers of the land hunted over (q).

By the common law there is no property in game until Game laws. it is taken and reduced into possession; and therefore the wrongful taking of game by a trespasser cannot be dealtwith as larceny or stealing of goods (h). The only remedy for the landowner at common law is by a civil action for the trespass. But statutes have been passed from time to time for the further protection of land from trespasses in pursuit of game, and for protection to the right of taking These are commonly known as the Game Laws, and the principal enactments as to trespassers are as follows:— By the Game Laws Amendment Act, 1 & 2 Will. IV. c. 32, s. 30, "If any person shall commit any trespass by Penalty on entering or being, in the daytime, upon any land in search of or pursuit of game, or woodcocks, snipes, quails, landrails, or coneys, such persons shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding two pounds, as to the justice shall seem meet, together with the costs of the conviction; provided always that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave

<sup>(</sup>f) Churchward v. Studdy, 14 East, 249. (g) Paul v. Summerhayes, L. R. 4 Q. B. D. 9; 48 L. J. M. 33.

<sup>(</sup>h) 3 Co. Inst. 109; 7 Co. 18 a, Case of Swans; Queen v. Townley, L. R. 1 C. C. R. 315; 40 L. J. M. 144; Queen v. Read, L. R. 3 Q. B. D. 131; 47 L. J. M. 50.

and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor or other person shall have the right of killing game upon such land by virtue of any reservation or otherwise; but such landlord, lessor or other person shall for the purpose of prosecuting such offence be deemed to be the legal occupier of such land whenever the actual occupier thereof shall have given such leave or licence."—Entering land by night for the purpose of taking game is made subject to the punishment of imprisonment, by 9 Geo. IV. c. 69, s. 1.—These enactments apply to live game only, and not to a trespass by a person entering land to take game killed there (i).—By 1 & 2 Will. IV. c. 32, s. 12, "Where the right of killing the game upon any land in exclusion of the right of the occupier of such land shall be specially reserved by or granted to or doth or shall belong to the lessor, landlord or any person whatsoever other than the occupier of such land, then, if the occupier of such land shall pursue, kill or take any game upon such land, or shall give permission to any other person so to do, without the authority of the lessor, landlord or other person having the right of killing the game, such occupier shall on conviction forfeit and pay" a sum of money not exceeding two pounds together with the costs of conviction.—In a prosecution under this section the exclusive right must be proved by production of the deed of grant (k).

Game defined.

Penalty on occupier.

For the purposes of these statutes, and also for the purpose of the excise in granting licences to kill and sell game, the following animals are declared to be game:—"Hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards" (l). In the enactment 1 Will. IV. c. 32, s. 30, which makes it a penal offence to trespass in the daytime in search of or pursuit of game, "woodcocks, snipes, quails, landrails, and coneys" are included in addi-

<sup>(</sup>i) Kenyon v. Hart, 6 B. & S. 140; post, p. 78. 249; 34 L. J. M. 87. (k) Barker v. Davis, 34 L. J. M. (i) 9 Geo. IV. c. 69, s. 13; 1 & 2 Will. IV. c. 32, s. 2.

tion to the above. The sect. 12 of the same statute which imposes a penalty upon the occupier of land killing game without authority, does not include "rabbits;" he may kill them and employ persons to do so (m). In the larger definition of the Poaching Prevention Act, 25 & 26 Vict. c. 114, s. 1 game includes "Hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game." In the "Ground Game Act, 1880," the words "ground game" are defined to mean "hares and rabbits" (n). The word "game" is sometimes used in the general meaning of any wild animals which are fit for the food of man (o).—It has been supposed, as to a class of Noxious wild animals, other than game, described as noxious, that there is a general right to kill them wherever found for the public good, and to pursue them, if necessary for that purpose, over the lands of any person (p). But doubt has been recently expressed concerning such right; and fox hunting, at least in the ordinary practice of the sport, cannot be justified under such supposed right, but must be carried on subject to the ordinary laws of property; therefore it can be lawfully followed only over the lands of those persons whose consent is expressly or tacitly given (q).— By the general rule of the common law, fish in a pond, deer in a park, coneys in a warren, doves in a dove-house, young and old, go to the heir with the inheritance, because they are at liberty. But all such animals, if reclaimed Tame and tamed, become personal chattels in all respects; they animals. pass to the executor, and not to the heir or devisee of the land (r). Such is the condition, for the most part, of deer in a park in modern times; they pass to the executor, and

<sup>(</sup>m) Spicer v. Barnard, 28 L. J. M. 176; Padwick v. King, 29 L. J. M. 42.

<sup>(</sup>n) Post, p. 80.

<sup>(</sup>o) Ante, p. 73. (p) Gundry v. Feltham, 1 T. R.

<sup>(</sup>q) Paul v. Summerhayes, 4 Q. B. D. 11; 48 L. J. M. 33; unte, p. 75.

<sup>(</sup>r) Co. Lit. 8 a; 2 Blackst. Com. 428.

they may be distrained for rent as personal chattels (s). And under such circumstances it is no waste of the inheritance not to maintain a herd of deer (t).

Right to game as separate property.

The right to take game may be severed from the ownership of the land and held as separate property. The right thus severed is of the nature of a profit à prendre in the land of another; it is an incorporeal hereditament lying in grant, which can be created and conveyed at common law only by deed under seal (u). It cannot be created by way of reservation or exception, strictly so called, from a grant of land, being no part of the thing granted; and if so expressed in a deed of grant executed by the grantee, it operates, technically, as a new and distinct grant from the grantee, who becomes the owner of the land by the same deed and may grant the right of taking game in fee, or in tail, or for life, or for years (x).—A written agreement not under seal to grant the right of taking game, though it may not operate to convey the legal right, may support a claim to the rent or consideration or other stipulation of the agreement, after the legal right has been fully enjoyed for the time agreed (y). It may also be valid as a contract of which specific performance will be enforced; and may thus create an equitable title; and by the operation of the Judicature Acts the equitable title becomes, for most purposes, equivalent to the legal title (z). The law requiring a deed under seal is a lex loci rei site and not a lex fori: it therefore does not apply in English Courts to the proof of a Scotch agreement for game, for which a deed under seal

<sup>(</sup>s) Davies v. Powell, Willes, 46; Morgan v. Abergavenny, 8 C. B. 768. (t) Ford v. Tynte, 31 L. J. C. 177.

<sup>(</sup>u) Bird v. Higginson, 6 A. & E. 824; Wickham v. Hawker, 7 M. & W. 63; Barker v. Davis, 34 L. J. M. 140. See post, p. 330.

<sup>(</sup>x) Moore v. Plymouth, 7 Taunt. 626; Wickham v. Hawker, 7 M. & W. 63; Doe v. Lock, 2 A. & E.

<sup>743;</sup> Pannell v. Mill, 3 C. B. 625.
(y) Thomas v. Fredricks, 10 Q. B.
775; Adams v. Clutterbuck, L. R.
10 Q. B. D. 403; 52 L. J. Q. B.
607.

<sup>(</sup>z) Walsh v. Lonsdale, L. R. 21 C. D. 9; 52 L. J. C. 2; Althusen v. Brooking, L. R. 26 C. D. 565; 53 L. J. C. 522. See Swain v. Ayres, L. R. 21 Q. B. D. 293; 57 L. J. Q. B. 430.

is not required by the law of Scotland (a). The right of taking game as a profit à prendre is an interest in land within the 4th section of the Statute of Frauds, and therefore a contract concerning it must be proved by writing signed by the party charged therewith; and this is a rule of procedure or lex fori (b).—Where the game is reserved or granted as a separate interest from the occupation, the owner is primâ facie responsible for overstocking with game and for damage done by the excess of game beyond the natural supply (c). He is not justified in importing game bred on other ground, and it seems the occupier might kill the excess as a nuisance (d). He may maintain an action for disturbance of the game (e).

"The Ground Game Act, 1880," 43 & 44 Vict. c. 47, Ground Game has restricted the power of severing the game from the occupation. Sect. 1 enacts, "Every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land: provided that the right conferred on the occupier by this section shall be subject to the following limitations." These limitations are to the effect that the occupier shall exercise the right only by himself or by persons authorized by him in writing; being resident members of his household, his ordinary servants, and one person employed for reward.—The right of the occupier is made inalienable by sect. 3 enacting, that "Every agreement, condition or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him

 <sup>(</sup>a) Adams v. Clutterbuck, supra.
 (b) Webber v. Lee, L. R. 9 Q. B.
 D. 315; 51 L. J. Q. B. 174; Leake on Contracts, 2nd ed. 295.

<sup>(</sup>c) Farrer v. Nelson, L. R. 15 Q. B. D. 258; 54 L. J. Q. B. 385.

<sup>(</sup>d) Birkbeck v. Paget, 31 Beav. 403. (e) See Ibbotson v. Peat, 3 H. & C. 644; 34 L. J. Ex. 118; Pattison v. Gilford, L. R. 18 Eq. 259; 43 L. J. C. 524; Gearns v. Baker, L. R. 10 Ch. 355; 44 L. J. C. 334.

any disadvantage in consequence of his exercising such right, shall be void." Sect. 5 excepts from the operation of the Act "the right to kill or take ground game vested by lease, contract of tenancy, or other contract boná fide made for valuable consideration in some person other than the occupier" at the date of the passing of the Act. A reversionary right under an agreement for a future lease is within the exception (e). Sect. 8 enacts that, "for the purposes of this Act, the words 'ground game' mean hares and rabbits."

Licence to sport.

A licence to hunt and kill game without taking away the game killed, is a licence of sporting or pleasure only, and not a licence of profit; it is therefore strictly personal to the licensee, and not assignable; and it is not any interest in land within the Statute of Frauds (g). "If there be a personal licence to an individual to hunt at his pleasure, he cannot take away to his own use the game killed, or go with servants, still less send servants to kill for him, or assign his licence to another: but if the person is meant to have a property in the game which he kills, it is otherwise. And therefore if the licence is to hunt, kill, and carry away, he may hunt with servants or by servants. If there be a licence for him and his servants to hunt, by these words 'for him and his servants' shall be understood a licence of profit; for these words imply that the grantee hath a property in the thing hunted, because that by such a licence the grantee may justify for his servant to hunt. which is more than a licence of pleasure. Whether the liberty is to be exercised by the licensee or his servants, or by the licensee or his assigns, makes no difference in this respect; both show that not a personal licence, but a licence of profit was intended to be granted "(h).

<sup>(</sup>e) Allhusen v. Brooking, L. R. 26 C. D. 559; 53 L. J. C. 520. (g) Webber v. Lee, L. R. 9 Q. B. D. 315; 51 L. J. Q. B. 174.

<sup>(</sup>h) Per cur. Wickham v. Hawker, 7 M. & W. 78; citing Manwood's Forest Law, c. 18, s. 3.

The general rule of construction of grants and leases of Construction land, as to the right to take the game, is that the game of grants and leases as to presumptively follows the possession of the land in the the game. absence of expressed intention to the contrary (i). written agreement of tenancy containing a clause to the effect that the tenant should not destroy any game, that he should at request of the landlord forbid trespassing, and should preserve all the game bred on the land, was construed as insufficient to give the landlord the right to enter and take the game; it deprived the tenant of the right, but did not impliedly vest it in the landlord. Therefore the tenant could not be convicted as occupier of killing game reserved to another, under 1 & 2 Will. IV. c. 32, s. 12(j). So a clause in a lease authorizing the lessor to prosecute trespassers in pursuit of game was held insufficient to invest him with the right of taking the game (k). A grant of free liberty of "hawking and hunting" was construed not to extend to shooting game with a gun; the word "hunting," as it was said, in its fair acceptation, not extending to shooting feathered game (1).—Upon Inclosure of the inclosure of wastes of a manor, over which the lord has the right to the game as incident to his ownership of the soil, the commissioners under the General Inclosure Acts, in allotting the waste in several ownership, have power to sever the right to the game and reserve it to the lord as a separate tenement. How far they have done so in any particular case is a question of the meaning of the terms of their order, according to the ordinary principles of construction (m). Where an inclosure was made with

<sup>(</sup>i) Moore v. Plymouth, 7 Taunt. 614; see 1 & 2 Will. IV. c. 32, ss. 7, 8. By the Scotch law the presumption is that a lease confers only such rights as are necessary for the purpose for which the land is let. An agricultural lease includes only agricultural rights, and the rights of hunting, shooting, fishing and the like, subject to liability for damage, are reserved

ex lege, without special reservation. Copland v. Maxwell, L. R. 2 Sc. Ap.

<sup>(</sup>j) Ante, p. 76; Coleman v. Bathurst, L. R. 6 Q. B. 366; 40

L. J. M. 131; Lush, J. dissentiente.
(k) Pannell v. Mill, 3 C. B. 638.
(l) Moore v. Plymouth, 7 Taunt.

<sup>(</sup>m) Musgrave v. Forster, L. R. 6 Q. B. 590; 40 L. J. Q. B. 207;

reservation to the lord of all manorial rights, including the right of "hawking, hunting, fishing and fowling, incident or belonging or appertaining to the manor"; it was held that his right to the game as an incident of the soil ratione soli, was not included in the reservation of manorial rights or of rights incident to the manor; and the lord having in fact no franchise or manorial right of the kind beyond that incident to his ownership of the soil, retained no right of shooting over the allotted lands (n).

The statute 43 Eliz. c. 2, which established the rating of

Rating of game as separate tenement.

land for the relief of the poor, did not apply to the right of taking the game, when held as a separate tenement. Land occupied together with the right to the game is rateable at the enhanced value due to the game (o). And if the occupier himself lets the game to another, the land continues rateable at a value enhanced by the rent derived by the occupier from the game (p). But land occupied separately from the game is rateable only upon the value of the occupation, exclusive of the value of the game (q). —By "The Rating Act, 1874," 37 & 38 Vict. c. 54, s. 3, the above Act 43 Eliz. c. 2, and other Rating Acts are extended "to rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land." Sect. 6 (1) provides that "where any right of taking game is severed from the

occupation of the land and is not let, and the owner receives rent for the land, the rateable value of the land shall be estimated as if the right were not severed"; and the occupier may deduct from his rent the increase of the rate, if any, due to the estimate of the game. (2) "Where

Rating Act, 1874.

Graham v. Ewart, 7 H. L. C. 331; 29 L. J. Ex. 88; Leconfield v. Dixon, L. R. 3 Ex. 30; 37 L. J.

(n) Sowerby v. Smith, L. R. 9 C. P. 524; 43 L. J. C. P. 290; Greathead v. Morley, 3 M. & G. 139; Bruce v. Helliwell, 5 H. & N.

609; 29 L. J. Ex. 297; post, p. 86. (o) Eyton v. Mold, L. R. 6 Q. B. D. 13; 50 L. J. M. 39. (p) Queen v. Battle, L. R. 2 Q. B. 8; 36 L. J. M. 1. (q) Queen v. Thurlstone, 1 E. & E. 502; 28 L. J. M. 106.

any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, may be rated as the occupier thereof." Under this enactment, where the owner and occupier of the land lets the game, either he may be rated upon his occupation enhanced by the rent paid for the game, or the lessee of the game may be rated upon its value (r).

The property in game above indicated as existing jure privilegii consisted of the ancient franchises or rights of forest, chase and warren, now practically obsolete; but which have left traces in the language and doctrines of the law that require some explanation. The early English Forests. kings claimed a prerogative right of property in game and wild animals, as being nullius in bonis; and for the use and enjoyment of their right they exercised the further prerogative of proclaiming any district at their will and pleasure to be a forest, with the consequence of subjecting it to a special body of law called the Forest Law, administered by special justices and other officers commissioned by the Crown, and to that extent withdrawing the district from the jurisdiction of the common law, or at least supplementing the common law in that district (s). The Forest laws. forest laws "are not rules of the common law nor Acts of Parliament; but they are regulations made by the Crown for the government of the forest." They are not matter of judicial notice; but they are matter of evidence, and may be proved by usage where they cannot be produced (t). The forest laws were directed to the preservation of the beasts of chase, which involved also the protection of the woods and pastures. Waste committed on the woods or pasture, by clearing or cutting or ploughing up, was visited with penalties; no buildings or inclosures were

<sup>(</sup>r) Kenrick v. Guilsfield, L. R. 5 C. P. D. 41; 49 L. J. M. 27. (s) Manwood's Forest Law, c. 2, following Bracton; 2 Blackst. Com.

<sup>415, 419.</sup> (t) Mellish, L. J. Sewers Com-missioners v. Glasse, L. R. 7 Ch. 468; 41 L. J. C. 419.

Charter of the Forest.

allowed, unless with licence of the proper authorities of the forest (u). But by custom and by prescription tenants of land within the forest acquired rights of common of various kinds in the woods and wastes, as appurtenant to their tenements; which remain valid and valuable at the present day (x).—By the Charter of the Forest, 1 Hen. III., A.D. 1216, confirmed in successive parliaments of that and succeeding reigns, it was conceded by the Crown that all lands that had been afforested under the preceding kings should be disafforested, so far as they extended beyond the demesne lands of the Crown; within which territorial limits the forest laws continued in force.—Before this statute the Crown had claimed and exercised an unlimited right of afforesting all lands, whether demesne lands or lands in tenure: except that by the Magna Carta of John, A.D. 1215, it had been conceded that all lands afforested in his time should be disafforested. The lands disafforested by the Carta de Foresta were thereby exempted from the jurisdiction of forest law as regards the tenants of lands therein, who then became entitled freely in right of their tenements to take the game, to cut woods, and to inclose and plough pastures; but as regards other persons, they still remained forest. The lands thus circumstanced were distinguished as purlieus of the forest, within which the forest law was in force except against tenants of the land (y). Grants of demesne lands within a forest made subsequently to the above Charter of . the Forest were subject to forest law, unless expressly exempted by the terms of the grant; because by common law royal prerogatives and franchises do not pass in a grant of land, without express words. Hence all tenants within a forest became bound to show their title to exemp-

<sup>(</sup>u) Manwood's Forest Law, ec. 8, 9, 10.

<sup>(</sup>x) See the case of Epping Forest, Sewers Commissioners v. Glasse, L. R. 19 Eq. 134; 44 L. J. C. 129; of Ashdown Forest, Earl de la Warr

v. Miles, L. R. 17 C. D. 535; 50 L. J. C. 754; of Hatfield Forest, Barrington's Case, 8 Co. 136 b; and the Case of Forests, 12 Co. 22. (y) Manwood's Forest Law, c. 20.

tion from forest law (z).—A forest, though a royal fran- Chase. chise created by prerogative of the Crown, might be granted, as regards the beneficial incidents, to a subject. But the royal prerogative of holding courts and appointing judicial officers could not be held by a subject, who could only have recourse to the ordinary process of the common law. The franchise of forest thus stript of its special courts and jurisdiction in the hands of a subject was designated by the name of a chase (a). A chase, like a forest, was open and uninclosed; if inclosed, it became a There may be a park in mere name, without Park. any franchise by charter or prescription; and such is the condition of nearly all parks at the present day (b).

Free warren is a franchise similar to that of forest or Free warren. chase, but extending only to beasts and fowls of warren; which include hares and rabbits as beasts of warren, and pheasant and partridge as fowls of warren. franchise of free warren gives a property in wild animals, and that property may be claimed in the land of another to the exclusion of the owner of the land. Such a right ought not to be extended by argument or inference to any animals not clearly within it." Grouse are not fowls of warren (c). The right of free warren may be restricted to certain only of the beasts or birds of warren; and coneys being the principal beasts of warren as regards profit, a "warren of coneys" was frequently granted, as a distinct species of right (d). The term "warren" may serve in a grant by way of special description to pass the land itself. if so intended and expressed (e).—The grant of a manor Grant of by the Crown was sometimes accompanied with a grant manor with warren. of the franchise of warren within the manor; but free warren is not an ordinary incident of a manor. For the

<sup>(</sup>z) Manwood, 3rd ed. p. 136; Plowd. 332 b.

<sup>(</sup>a) Manwood, 3rd ed. pp. 52, 77; Case of Forests, 12 Co. 22. (b) Manwood, 3rd ed. p. 52; 2 Blackst. Com. 38, 416; ante, p. 77.

<sup>(</sup>c) Devonshire v. Lodge, 7 B. & C. 36; Manwood, e. 1, s. 5; c. 4, s. 3; Co. Lit. 233 a.
(d) L. Chelmsford, Reauchamp v.

Winn, L. R. 6 H. L. 238.

<sup>(</sup>e) Ante, p. 6.

lord of a manor as such has no right to the game within the manor beyond his demesne land, unless he can show some special franchise (f). A grant by the Crown of a manor with free warren within the manor prima fucie gives the right of warren over the lands of the grantee only, that is, over his demesne lands, strictly so called; for the Crown cannot grant any such right over the lands of a subject without his consent. "A grant of free warren is in general confined to the lands of the grantee; the king cannot grant it over the land of a third person; and though he might grant it over his, the king's, own lands, unless the words were such as to show unequivocally that such was the intention, they would not have that effect "(g). A grant by the Crown of a manor with free warren is a grant of the franchise as a right in gross, and does not annex it as an appurtenance to the manor; consequently where the grantee afterwards conveyed the manor, "with all rights, profits, royalties, franchises, &c. belonging or appertaining to the manor"; it was held that the franchise of warren did not pass by the conveyance (h). But a warren may be appurtenant to a manor by prescription, so as to pass with the manor; and a man may have warren in the land of another as appurtenant to his manor, and if the manor is granted cum pertinentiis, the warren will pass (i).

<sup>(</sup>f) Dacre v. Tebb, 2 W. Blackst. 1151; Pickering v. Noyes, 4 B. & C. 639; Cockburn, C. J. Sowerby v. Smith, L. R. 9 C. P. 532; 43 L. J. C. P. 290. (g) A.-G. v. Parsons, 2 C. & J.

<sup>(</sup>h) Bowlston v. Hardy, Cro. Eliz. 547; Morris v. Dimes, 1 A. & E.

<sup>(</sup>i) Taunton, J. Morris v. Dimes, 1 A. & E. 666; per cur. Pannell v. Mills, 3 C. B. 638.

## CHAPTER VII.

## HOUSES AND BUILDINGS.

Property in land-includes houses and buildings-house includes land on which it is built-appurtenants-Lands Clauses Act.

Partition of house into separate tenements-relative rights of part

Liability of tenant for waste and repair of houses and buildings-permissive waste-charge of repair-incumbent of benefice-tenant "without impeachment of waste."

Waste in houses and buildings—new buildings—reasonable use superior force-accidental fire-suspension of rent.

Covenant of lessee to repair—exceptions of fire and other accidents implied contract for tenant-like use-liability of landlord to repair -implied warranty of demised premises-covenant of lessor to repair-insurance against fire.

Repairs and improvements of settled estates—jurisdiction of Court -Settled Land Act.

Land, as a general designation of the subject of pro- Land includes perty, includes all houses and buildings annexed to the houses and buildings. soil; and it is so construed primâ facie in deeds, wills and other legal documents. "For houses consist of two things, viz., land or ground as the foundation, and structure thereupon; so as passing the land or ground, the structure or building thereupon passeth therewith" (a). But some buildings may be so constructed and placed upon independent supports as to be considered as separate moveable chattels (b).—By the statute 13 & 14 Vict. c. 21, "An Act for shortening the language used in Acts of Parliament," it is enacted, sect. 4, "that in all Acts the word 'land' shall include messuages, tenements

(b) Post, p. 112.

<sup>(</sup>a) Co. Lit. 4 a; see Goodtitle d. Chester v. Alker, 1 Burr. 144.

and hereditaments, houses and buildings, of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure." But in some Acts the words "houses and buildings" are used in distinction to "land"; as in the Act for Lighting and Watching of Parishes, 3 & 4 Will. IV. c. 90, s. 33, by which "houses and buildings" are rated three times higher than "land" (c).—Trusts to invest in "land" may, in general, be executed by the purchase of houses; or by building houses upon land settled upon the same trusts, for this is substantially the same thing as purchasing houses as regards augmentation of the property. But repairs and improvements of existing houses upon settled land do not come within the principle, unless expressly authorized, because they would unduly benefit the tenant for life (d). The same principle is applied in the re-investment of the purchase-money of settled land under the Lands Clauses Act, and under the Settled Estates Acts, and under the Settled Land Act,

House inbuilt.

Appurtenants.

The term "house" or "messuage" or any like designacludes land on tion of a structure or building, in deeds, wills, and other legal documents, primâ facie includes the land whereon it stands. Also "By the grant of a messuage or house, the orchard, garden and curtilage do pass; and so an acre or more may pass by the name of a house." The additional land passes as being in fact part of the entire subject designated as house or messuage (f).—It is usual to add in a conveyance of a house or land the phrase "with the 'appurtenants"; but this phrase does not serve to enlarge the subject of conveyance. It will not convey other land, besides that which passes with the house or land designated,

<sup>(</sup>c) The Queen v. North, L. R. 6 Q. B. 707; 40 L. J. M. C. 193. (a) Drake v. Trefinis, L. R. 10 Ch. 364; Re Lestie's Settlement, L. R. 2 C. D. 185; 45 L. J. C. 668; Donaldson v. Donaldson, L. R.

<sup>3</sup> C. D. 743. (e) Re Leigh's Estate, L. R. 6 Ch. 887; 40 L. J. C. 442; Re Newman's Estates, L. R. 9 Ch. 681; 43 L. J. C. 702. (f) Ante, p. 6.

merely by reason of such other land having been in fact usually annexed to or occupied with the subject of conveyance. The phrase has a strict technical meaning with reference to the easements which may be appurtenant to a house or land, as ways and lights; and land cannot be claimed as an easement to other land (g). "Neither in a deed nor in a will does the word 'appurtenants' include land, if the principal subject of gift is land or a messuage. But if from the circumstances and the whole context, it is clear that land is intended to pass as appurtenant, the word 'appurtenant' is flexible enough to carry it" (h).

Vict. c. 18, which gives to public companies compulsorv Act. powers of purchasing land, provides by s. 92, "that no party shall be required to sell a part only of any house, or other building or manufactory if such party be willing and able to sell the whole thereof." Under this provision it frequently becomes necessary to determine what is the whole of a house which the purchaser may be compelled to take. The word "house" is not defined in the Act; it is therefore construed in the ordinary meaning of legal instruments to include garden, curtilage and all the appurtenants above described which would pass under a conveyance of the house as applied to the case in question; no part only of which can the owner be required to sell, if willing to sell the whole (i). The word "manufactory" has a wider meaning; "a manufactory may be more than one house or more than one building, or it may consist of neither house nor building, but only of land used for a

purpose of manufacturing"; and the purchasing company may be compelled to take the whole (j). The owner in all

The Lands Clauses Consolidation Act, 1845, 8 & 9 Lands Clauses

<sup>(</sup>g) Ante, p. 7; see post, p. 190.
(h) Kay, J. Cuthbert v. Robinson,
51 L. J. C. 238; Blackburn v.
Edgley, 1 P. Wms. 603; per cur.
Thomas v. Oven, L. R. 20 Q. B. D.
232; 57 L. J. Q. B. 202.

<sup>(</sup>i) Grosvenor v. Hampstead Junction Ry., 1 De G. & J. 446; 26

L. J. C. 731; Steele v. Midland Ry., L. R. 1 Ch. 275; Barnes v. Southsea Ry. Co., L. R. 27 C. D. 536; Kerford v. Scacombe Ry., 57 L. J. C. 270.

<sup>(</sup>j) Richards v. Swansca Improv. Co., L. R. 9 C. D. 425.

such cases cannot be compelled to sell to the company more than is necessary for their authorized undertaking (k). —In the Burial Acts, which provide that no ground shall be used for burial within the distance of one hundred yards from a dwelling-house; the word "dwelling-house" is construed strictly as a point for measuring the distance, and not as including garden or curtilage (l).

Partition of house in separate tenements.

It is a general rule of construction that a conveyance of a house or building, as of land, presumptively carries with it everything vertically above and below the property described; but it may be restricted in application to the actual state of the property. The house or building may be partitioned into separate tenements; "a man may have an inheritance in an upper chamber, though the lower buildings and soil be in another" (m). The lease of a house described as in the occupation of A. was held not to include the cellar which at the time of the lease was in the separate occupation of B.; and evidence was held admissible to show the state and occupation of the premises (n). In the case of two adjacent houses the rooms of which intersect, a conveyance or devise of the one will not include the intersecting rooms of the other. "The ordinary rule of law is that whoever has got the site is the owner of everything up to the sky and down to the centre of the earth. But that ordinary presumption of law is frequently rebutted by the fact that other adjoining tenements protrude themselves over the site. The question then arises whether the protrusion is a diminution of so much of the freehold, including the right upwards and downwards, as is defined horizontally by a section of the protrusion; or whether such a portion only is carved out of the freehold as is included between the ceiling of the room at the top

<sup>(</sup>k) Gard v. Commiss. of London, L. R. 28 C. D. 486; 54 L. J. C. 698.

<sup>(</sup>l) Wright v. Wallasey Board, L. R. 18 Q. B. D. 783; 56 L. J.

Q. B. 259.
(m) Co. Lit. 48 b.
(n) Doe v. Burt, 1 T. R. 701;

<sup>(</sup>n) Doe v. Burt, 1 T. R. 701; Press v. Parker, 2 Bing. 456; Martyn v. Lawrence, 2 D. J. & S. 261.

and the floor at the bottom" (o). So a defined portion of a room may be let separately from the remaining portion, with exclusive possession; as where a portion of a room in a factory was let off, with the use of steam-power at a fixed rent, it was held to be a good demise and that the lessor might distrain goods upon the premises for rent (p). So the boxes and stalls of a theatre may be separate subjects of sale and lease (q).

The partition of a house or building into separate tene- Relative ments creates relative rights and obligations of the several wights of partowners, analogous to such as exist between the several house. owners of surface and minerals (r). The grantor of an upper room of a house, with reservation of the lower, cannot derogate from his grant by removing the underpinning or support of the room granted, any more than upon a similar reservation of mines the grantor can take the whole of the minerals and let down the surface. in the absence of special agreement there is no obligation upon his part to repair the support; which the grantee must do for himself if necessary, and he may enter upon the lower room for that purpose (s). So, upon a grant of the lower part of a house or building reserving the upper, in the absence of express agreement, it seems there is no implied obligation to repair the roof or upper story (t). Where a house is partitioned in separate tenements, the owner or occupier of one tenement is bound to take all reasonable care in using his tenement to prevent any

<sup>(</sup>o) James, L. J. Corbett v. Hill,

<sup>(</sup>a) James, L. J. Coroett v. Hill, L. R. 9 Eq. 671; 39 L. J. C. 547. (p) Selby v. Greaves, L. R. 3 C. P. 594; 37 L. J. C. P. 251. (q) Flight v. Glossop, 2 Bing. N. C. 125; Leader v. Moody, L. R. 20 Eq. 145; 44 L. J. C. 711; Scott v. Howard, L. R. 6 Ap. Ca. 295.

<sup>(</sup>r) Ante, p. 55. (s) Colebeck v. Girdlers' Co., L. R. 1 Q. B. D. 234; 45 L. J. Q. B. 225; Parke, B. Harris v. Ryding, 5 M. & W. 71.

<sup>(</sup>t) 1 Wms. Saund. 322, n. (1), Pomfret v. Ricroft. By the law of Scotland "where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." Erskine's Inst., cited in Humphries v. Brogden, 12 Q. B. 756.

damage accruing to the other tenements, and he would be liable for the neglect of such duty; but he would not be liable for unavoidable accidents (u).

Liability of tenant for repair and waste of houses.

Permissive waste.

The only liability of a tenant for life or for years of houses and buildings, as regards the use and possession, in the absence of special stipulation, is the general liability for waste (r). And it seems doubtful whether a tenant for life or for years is liable at common law for mere non repair, as permissive waste (w). It is said that "waste may be done in houses by suffering the same to be uncovered, whereby the rafters or other timbers of the house are rotten"(x); but the bare suffering them to be uncovered, without rotting the timber, is not waste (y). Accordingly it has been held that a tenant from year to year is only bound to keep the house wind and water tight so far as to prevent waste and decay (z); and that "he is not liable for the mere wear and tear of the premises," as being permissive waste (a). But in a recent case it has been held that a lease with a covenant to repair, "fair wear and tear excepted," was not in conformity with a power to grant leases, not to be made without impeachment of waste; because the exemption from repairing the wear and tear was an exemption from liability for permissive waste, for which the tenant would otherwise be liable (b).—The doctrine of equity seems not doubtful. "Whatever be the legal liability, the Court has always

<sup>(</sup>u) Carstairs v. Taylor, L. R. 6 Ex. 217; 40 L. J. Ex. 129; Ross v. Fedden, L. R. 7 Q. B. 661; 41 L. J. Q. B. 270; see Anderson v. Oppenheimer, L. R. 5 Q. B. D. 602; 49 L. J. Q. B. 456; Stevens v. Woodward, L. R. 6 Q. B. D. 318; 50 L. J. Q. B. 231.

<sup>(</sup>v) See ante, p. 18; Parke, B. Dietrichsen v. Giubelei, 14 M. & W 850

<sup>(</sup>w) Per cur. Harnett v. Maitland, 16 M. & W. 262; see Herne v. Benbow, 4 Taunt. 764; Woodhouse v.

Walker, L. R. 5 Q. B. D. 407; 49 L. J. Q. B. 611.

<sup>(</sup>x) Co. Lit. 53 a; aute, p. 18. (y) Knoll's Case, Hargrave's note to Co. Lit. 53 a.

<sup>(</sup>z) Tenterden, C. J. Anworth v. Johnson, 5 C. & P. 239, citing Ferguson v. ——, 2 Esp. 590; Patteson, J. Leach v. Thomas, 7 C. & P. 327. (a) Taunton, J. Torrianov. Young,

<sup>6</sup> C. & P. 8.
(b) Davies v. Davies, L. R. 38 C.
D. 499. See Yellowly v. Gower, 11
Ex. 294; 24 L. J. Ex. 289.

declined to interfere against mere permissive waste; the Court never interposes in case of permissive waste, either to prohibit or to give satisfaction, as it does in case of wilful waste" (c). And "an equitable tenant for life cannot be called upon to repair and cannot be made liable for neglecting to repair "(d).

Repairs may be charged by the limitation of the estate; Charge of as where a house was devised upon the terms of the devisee for life "keeping the same in good and tenantable repair," and during his tenancy the house was destroyed by an accidental fire, it was held "that the will created an obligation upon the tenant for life to rebuild the premises" (e). Where a devisee for life, subject to the like charge, died leaving the premises out of repair, it was held that the remainderman had a right of action for waste by non-repair against the executor, and that the measure of damages was the sum necessary to put the premises in the state of repair in which the tenant for life ought to have left them (f).—The incumbent of an ecclesiastical Incumbent of benefice was held bound at common law to repair and maintain the house and buildings, having regard to the nature of the tenancy (g). During the incumbency the patron of the benefice might bring a suit to restrain the commission of waste, and it seems he might have an account of the proceeds of waste committed (h). After the retirement or death of the incumbent the successor had an action against him or his executor to recover the value of the dilapidations (i). The dilapidations of buildings

<sup>(</sup>c) Cranworth, L. C. Powys v. Blagrave, 4 D. M. & G. 458; 24 L. J. C. 145, citing Castlemain v. Craven, 22 Vin. Abr. 523; Wood v. Gaynon, Ambl. 395; see Warren v. Rudall, 1 J. & H. 1; 29 L. J. C. (d) Cotton, L. J. Re Hotchkys,

L. R. 32 C. D. 418; 55 L. J. C.

<sup>(</sup>e) Re Skingley, 3 Mac. & G. 22ì.

<sup>(</sup>f) Woodhouse v. Walker, L. R.

<sup>5</sup> Q. B. D. 404; 49 L. J. Q. B. 609; see Batthyany v. Walford, L. R. 33 C. D. 630.

<sup>(</sup>g) Wise v. Metcalfe, 10 B. & C. 299; Huntley v. Russell, 13 Q. B.

<sup>(</sup>h) Holden v. Weekes, 1 J. & H. 278; 30 L. J. C. 35; Sowerby v. Fryer, L. R. 8 Eq. 423; 38 L. J. C. 617.

<sup>(</sup>i) Bunbury v. Hewson, 3 Ex. 558; Stirling, J. Re Monk, L. R. 35 C. D. 585.

of ecclesiastical benefices are now specially provided against and remedied by "The Ecclesiastical Dilapidations Act, 1871," 34 & 35 Vict. c. 43 (g).

Tenant
"without
impeachment
of waste."

Tenant for life "without impeachment of waste," though not chargeable at law with waste, is chargeable with equitable waste, that is, wilful and unreasonable abuse of the property. Where tenant for life under a settlement "without impeachment of waste" from motives of displeasure at his son who was tenant in remainder, began wilfully to destroy the house, the Court granted an injunction to restrain the waste and decreed that the house should be restored (h).

Waste in houses and buildings.

The pulling down of houses or buildings by the tenant is primâ facie waste; so also any destruction done to a house or building or to any part of it, or to any fixture annexed to it, is primâ facie waste, for which the tenant is responsible to the lessor or reversioner. If a house or building be ruinous at the tenant's coming, it is not waste in him to suffer it to fall down, but it is waste if he pull it down, unless for the purpose of rebuilding it (i). But the pulling down of a building is not waste, if proved not to be to some material extent injurious to the inheritance (k).—If the tenant wastefully pulls down a house, the lessor, besides his action of waste, becomes entitled to the property in the materials, as being parcel of the inheritance in which the interest of the lessee is determined by the severance; as in the case of trees wastefully cut (1). But "if the house fall down by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in and fall down, the tenant may build the same again with such

Property in materials.

<sup>(</sup>g) Jones v. Dangerfield, L. R. 1
C. D. 438; 45 L. J. C. 161; Kimber v. Paravicini, L. R. 15 Q. B. D. 222; 54 L. J. Q. B. 471; Re Monk, L. R. 35 C. D. 583.

<sup>(</sup>h) Vane v. Barnard, 2 Vern.

<sup>738; 1</sup> Salk. 161; ante, p. 24.
(i) Co. Lit. 53 a; ante, p. 18.
(k) Doe v. Earl of Burlington, 5

B. & Ad. 507. (l) 4 Co. 63 a, Herlakenden's Case; ante, p. 37.

materials as remains, and with other timber which he may take growing on the ground" (m). A tenant may in general take materials for repairing houses and buildings from the demised premises, as timber, stone and the like. But if the tenant commit waste, and then fell down timber to repair the same, this is a double waste (n).

It is laid down that "if the tenant build a new house it New buildis waste, and if he suffer it to be wasted it is a new ings. waste"; but this is to be understood with the condition that the new house or building affects the inheritance of the land in manner which the law recognizes to be injurious (o). Opening a new door in a house was held not to be waste, unless proved to weaken or injure the building (p). Pulling down old buildings and replacing them with new may be injurious to the inheritance by increasing the charge upon the estate and thereby diminishing its value, or by confusing the identity and impairing the evidence of title; and if it be proved to be injurious to a material extent it is waste (q). And the making of new walls, fences, hedges or ditches, to the confusion of boundaries, may be waste (r). A provision in a lease that the tenant should repair and keep in repair such buildings, improvements and additions as should be made by him during the term, was construed to give him an implied licence to make such improvements and additions, which

A tenant is not liable for damage or destruction of Proper and buildings resulting from reasonable use of them for the reasonable use. proper purpose for which they were intended; unless he is under some special obligation or agreement to repair. "No user of a tenement which is reasonable and proper,

otherwise might legally be waste (s).

(p) Young v. Spencer, 10 B. & C.

<sup>(</sup>m) Co. Lit. 53 a; 4 Co. 63 a, Herlakenden's Case; 11 Co. 82 a,

дегиакепием's Uase; 11 Co. 82 а, Bowles' Case.

(n) Co. Lit. 53 b; ante, p. 36.
(o) Co. Lit. 53 a; Jones v. Chappell, L. R. 20 Eq. 539; 44 L. J. C. 658; ante, p. 18.

<sup>145;</sup> Doe v. Jones, 4 B. & Ad. 126. (q) Greene v. Cole, 2 Saund. 259, note (11); Doe v. Bond, 5 B. & C. 855; Huntley v. Russell, 13 Q. B.

<sup>(</sup>r) Co. Lit. 53 b; Queen's Coll. v. Hallett, 14 East, 489. (s) Doe v. Jones, 4 B. & Ad. 126.

having regard to the class to which it belongs, is waste." Thus in the case of a building constructed and let for a warehouse, the lessee was held not to be responsible for the floors breaking down under a not unreasonable weight of goods, which, unknown to him, they were insufficient to bear (t). "The tenant is not liable for latent faults and defects in the property demised, in the absence of some express agreement imposing such liability upon him. is entitled to assume that it is fit to be used for the purposes for which it is let and for which it is apparently fit." "A tenant, however, is primâ facie bound to restore the property demised to him, and if the property is destroyed by the acts of himself or his undertenants the presumption is against him, and he must in order to exonerate himself show that the destruction was owing to causes for which he was not responsible" (u).

Superior force.

Accidental fire.

A tenant is not responsible for damage or destruction caused by superior force (vis major), without default or negligence on his part, as by enemies of the Queen; or by tempest, lightning, or the like; unless he has covenanted to repair absolutely and without exception of such events (v).—The destruction of a house or building by fire was attributed at common law to the negligence of the tenant, in absence of proof to the contrary; and "burning a house by negligence is waste "(w). Upon the same principle of presumptive negligence at common law the tenant of a house in which a fire began was liable to his neighbour for damage caused by the fire spreading. By the statute 14 Geo. III. c. 78, s. 86, re-enacting 6 Anne, c. 31. it was enacted "that no action shall be had against any person in whose house or other building or on whose estate any fire shall accidentally begin: provided that no contract or agreement made between landlord and tenant shall be

<sup>(</sup>t) Saner v. Billon, L. R. 7 C. D. 815; 47 L. J. C. 267; Manchester Warchouse Co. v. Carr, L. R. 5 C. P. D. 507; 49 L. J. C. P. 809.

<sup>(</sup>u) Per cur. Manchester Warehouse Co. v. Carr, L. R. 5 C. P. D. 512; 49 L. J. C. P. 809.

<sup>(</sup>v) Ante, p. 22. (w) Co. Lit. 53 b.

hereby defeated or made void." This statute is construed as referring to accidental fires only, and not to protect fires originating in negligence or intention (x).—Rent is not Suspension of suspended by the destruction of demised buildings by rent. fire or other accident, although neither the lessee nor the lessor may be bound to restore them, unless exemption from the rent be expressly stipulated for in such events; nor is there any claim in equity to restrain an action for the rent under such circumstances (y). If it is intended to suspend the payment of rent in such events the reservation or covenant for the rent must be expressly so qualified; and such exemption from rent will apply only in the events specified (z). The same law has been held to apply to the tenancy of an upper floor or of separate apartments of a house which is destroyed by fire; the tenant continuing liable upon his independent contract for rent, unless some agreement can be shown that the rent should cease with the occupation (a).

In leases of houses and buildings repairs are usually Covenants to made the subject of covenants and conditions, by which repair by lessee. the rights and obligations on both sides are defined; and the lessee is then liable only according to the terms of his covenant or agreement. If the tenant covenant absolutely to repair, he is bound to rebuild after destruction by fire or other accident, whether due to negligence or not (b). So also if he is charged with repairs by the limitation of his estate, as a devisee for life upon the expressed condition of "keeping the premises in good and tenantable

<sup>(</sup>x) Filliter v. Phippard, 11 Q. B. 347; Canterbury v. Att.-Gen., 1 Phill. 316; Hargrave's note (1) to Co. Lit. 57 a.

<sup>(</sup>y) Baker v. Holtzapfel, 4 Taunt. 45; 18 Ves. 115; Leeds v. Cheetham, 1 Sim. 146; Izod v. Gorton, 5 Bing. N. C. 501.

<sup>(</sup>z) Saner v. Bilton, L. R. 7 C. D.

<sup>815; 47</sup> L. J. C. 267; *Manchester Warehouse Co.* v. *Carr*, L. R. 5 C. P. D. 507; 49 L. J. C. P. 809.

<sup>(</sup>a) Izod v. Gorton, 5 Bing. N. C. 501; Packer v. Gibbins, 1 Q. B. 421.

<sup>(</sup>b) Bullock v. Dommitt, 6 T. R. 650; Walton v. Waterhouse, 2 Wms. Saund, 420 and notes ib.

Exceptions of fire and other accidents.

repair" (c).—Hence it is usual for a lessee in covenanting to repair houses and buildings, to make express exception of fire and tempest, and other like accidents to which the demised premises may be subject and which are beyond his control. An exception of "damage by fire, storm, tempest, or other inevitable accident," is construed to include such other accidents only as are ejusdem generis to those specified; therefore it does not include an accident happening from an ordinary and proper use of the property by reason of an inherent defect or insufficiency for such use (d). A covenant by the lessee to repair is sometimes qualified by an exception of "reasonable wear and tear;" these words are construed as including the ordinary destruction by reasonable and proper use, but not an extraordinary destruction though caused by such proper use (e). The damages payable under a covenant to leave in repair are measured according to the condition of repair required by the covenant, and irrespective of altered conditions of the property which may render the repairs inapplicable or valueless (f).—In the absence of express covenant or provision for repair, there is implied in law a contract or promise on the part of the lessee to use the demised premises in a tenant-like manner, which is in substance the same as the legal obligation as to waste; and under this implied promise the tenant may be charged with any act of wilful or voluntary or negligent waste; but, it seems, not with mere non-repair, or deterioration of the premises by the mere wear and tear of time (g).

Implied contract for tenant-like use.

Liability of landlord for repair.

A landlord or lessor is under no implied obligation to his tenant or lessee, to repair or maintain the demised premises; nor to compensate any loss sustained by the tenant

(c) In re Skingley, 3 Mac. & G.

Carr, supra. (f) Morgan v. Hardy, L. R. 17 Q. B. D. 770.

<sup>(21);</sup> anter v. Bilton, L. R. 7 C. D. 815; 47 L. J. C. 267; Manchester Warehouse Co. v. Carr, L. R. 5 C. P. D. 513; 49 L. J. C. P. 809. (e) Manchester Warehouse Co. v.

<sup>(</sup>g) Ante, p. 92; Martin v. Gilham, 7 A. & E. 543; Torriano v. Young, 6 C. & P. 8. But see Davies v. Davies, L. R. 38 C. D. 499.

from defects of repair; although he may have notice that from want of repair the premises are dangerous (i).—Nor Implied is there, in general, any implied warranty or condition in warranty of demised a lease, that the demised premises are in good repair or fit premises. for the purpose for which they are intended to be used; as was held in the case of a building let for a warehouse which was insufficient to support a reasonable weight of goods; nor is the lessor responsible for loss occasioned by such insufficiency (k). So there is no generally implied condition in letting a dwelling house that it is habitable or that it will last during the term demised; nor can the lessee rescind the lease and quit the house, if it does not satisfy such conditions (1). But exception is made in the letting of furnished houses and apartments, as to which there is an implied condition, that they are fit for residential purposes; and if they do not satisfy such condition the lessee may rescind the letting (m).—As regards third parties, the occupying tenant is primâ facie responsible for any injury or nuisance caused by the state of the premises; but the landlord may be responsible by reason of having undertaken the duty of repair (n).—A covenant by a lessor to Covenant by keep the demised premises in repair during the term im- lessor to repair. pliedly imports the condition that the lessee must give him notice from time to time of want of repair, the knowledge of which rests with the lessee. A covenant by the lessor to put the premises in repair does not require notice; nor does a covenant to repair by the lessee (o). A covenant by

<sup>(</sup>i) Gott v. Gandy, 2 E. & B. 845; 23 L. J. Q. B. 1; Colebeck v. Girdlers' Co., L. R. 1 Q. B. D. 242; 45 L. J. Q. B. 225. See *Ivay* v. *Hedges*, L. R. 9 Q. B. D. 80.

<sup>(</sup>k) Manchester Warehouse Co. v. Carr, L. R. 5 C. P. D. 507; 49 L. J. C. P. 809; Hart v. Windsor, 12 M. & W. 68; and Sutton v. Temple, 12 M. & W. 52.

<sup>(1)</sup> Arden v. Pullen, 10 M. & W.

<sup>(</sup>m) Smith v. Marrable, 11 M. &

W. 5; Wilson v. Finch-Hatton, L. R. 2 Ex. D. 336; 46 L. J. Ex.

<sup>(</sup>n) Russell v. Shenton, 3 Q. B. 449; Chauntler v. Robinson, 4 Ex.

<sup>(</sup>o) Makin v. Watkinson, L. R. 6 Ex. 25; 40 L. J. Ex. 33; Manchester Warehouse Co. v. Carr, supra. See London & S. W. Ry. v. Flower, L. R. 1 C. P. D. 77; 45 L. J. C. P. 54. But see Conveyancing Act, 1881, s. 14.

Insurance . against fire.

the lessor to repair during the term operates as an exemption of the lessee from all liability for repairs; consequently a lease containing such a covenant, being made under a power which imposed the condition that lessees should not be made dispunishable for waste, was held to be beyond the power and invalid (p).—An insurance by the lessor against fire does not impliedly bind him to apply the proceeds to the rebuilding or repairing of the premises; nor has the lessee, though under covenant to repair and to pay rent, any claim in equity to have the proceeds so applied, in the absence of any stipulation to that purpose (q). Upon the same principle it is held that a purchaser of a house is not entitled, at law or in equity, to the benefit of an insurance made by his vendor, without any stipulation for it in the contract of sale (r). And, in general, an insurance is presumed to be made for the exclusive benefit of the person insured and not for that of all persons interested in the property (s). But by the Statute 14 Geo. III. c. 78, s. 83, "The directors of insurance offices are authorized and required, upon request of any person interested in any house or other building which may be burned down or damaged by fire, to cause the insurance money to be laid out towards rebuilding or repairing such house or building" (t).

Repairs and improvements on settled estates.

The repairs of houses and buildings upon settled estates are generally provided for in the settlement by vesting powers in trustees for that purpose. In the absence of express provision for raising the costs of repairs, the charge is presumptively to be borne by the entire property, so as to fall proportionally upon the tenant for life and the future successive interests, and not primarily upon the

<sup>(</sup>p) Yellowly v. Gower, 11 Ex. 274; 24 L. J. Ex. 289. (q) Leech v. Cheetham, 1 Sim.

<sup>(</sup>r) Poole v. Adams, 33 L. J. C. 639; Rayner v. Preston, L. R. 18 C. D. 1; 50 L. J. C. 472.

<sup>(</sup>s) Warwicker v. Bretnall, L. R. 23 C. D. 188.

<sup>(</sup>t) As to the construction and effect of this statute, see Exp. Gorely, Re Barker, 4 D. J. & S. 477; 34 L. J. B. 1; Rayner v. Preston, supra.

current rents and profits (u). If the tenant for life of settled land, although not charged with repair, does repairs voluntarily, he cannot charge the costs upon the entire property, unless by some special power, or by the authority of the Court obtained for that purpose (v). "A tenant for life is not in general a trustee for the persons entitled in remainder as to any improvements he may make upon the estate, and he cannot unless a special power is given him charge against the estate any sums expended by him in making them" (w).—The Court has a general Jurisdiction jurisdiction over settled estates by which it can order the repair or renewal of buildings at the cost of the estate. In a case where the mansion-house of a settled estate was falling down and there were no funds available to rebuild it, the Court authorized the trustees to raise the sum required for rebuilding by mortgage of the whole property, upon evidence that the value of the property subject to the mortgage and with the house would be greater than if the house were pulled down (x). Where there are funds of a settlement under trust for re-investment in land to the same uses as the settled estates, the Court will sanction the funds being applied in the erection of new buildings on the principle that the permanent improvement of the old estate is substantially the same thing as the purchase of a new estate (y) -By the Settled Land Act, 1882, 45 & 46 Settled Land Vict. c. 38, ss. 21, 25, capital money arising from the sale Act. of settled land under the Act may be applied in payment for any improvements authorized by the Act, including buildings for agricultural, manufacturing or domestic purposes. Under this Act the Court will not sanction the application of the capital money in payments for voluntary

<sup>(</sup>u) Powys v. Blagrave, 4 D. M. & G. 448; Re Hotchkys, L. R. 32 C. D. 408; 55 L. J. C. 546; Re Courtier, L. R. 34 C. D. 136; 56 L. J. C. 350.

<sup>(</sup>v) Ante, p. 92; Re Leigh's Estate, L. R. 6 Ch. 887; 40 L. J. C. 687.

<sup>(</sup>w) Mellish, L. J. Berkeley's Will, L. R. 10 Ch. 59; 44 L. J.

<sup>(</sup>x) Frith v. Cameron, L. R. 12 Eq. 169; 40 L. J. C. 778. (y) Re Newman's Settled Estates,

L. R. 9 Ch. 681; 43 L J. C. 702.

improvements made by the tenant for life without reference to the Court; nor in payment for charges previously incurred for buildings and improvements, and secured by terminable instalments (z). The Court will not sanction the application of capital money within the Act to mere repairs which do not amount to improvements allowed by the Act; and where there is a conflict between the provisions of the Act and the powers of the trustees of the settled land as to the application of capital or income upon improvements proposed, the provisions of the Act must prevail (a).

(z) Re Knatchbull's Estate, L. R. 29 C. D. 588; 54 L. J. C. 1168; Re Broadwater Estate, 54 L. J. C. 1104; Re Hotchkin's Estate, L. R. 35 C. D. 41; 56 L. J. C. 445. (a) Clarke v. Thornton, L. R. 35 C. D. 307; 56 L. J. C. 302.

## CHAPTER VIII.

## FIXTURES.

Fixtures defined—fixtures pass with the land—to purchaser—to lessee for life or years—to mortgagee.

Fixtures upon land of another.

What things are fixtures—fixtures for use of land—buildings and constructions upon land-fixtures for trade or business-machineryfixtures for domestic use-furniture-accessories to fixturesmovable buildings and constructions.

Tenant's fixtures-tenant in fee simple-tenant of limited estatetrade fixtures-domestic fixtures-ornamental fixtures and furniture—agricultural fixtures—Agricultural Holdings Act—right of removal during tenancy.

Covenants for removal of fixtures—covenants to leave fixtures.

Fixtures as subject of action—of execution—of distress for rent—in bankruptcy of tenant-disclaimer of lease by trustee.

Fixtures assigned separately from the tenement-Statute of Frauds-Bills of Sale Acts.

The word "fixtures" in the general and primary sense Fixtures demeans whatever things are so fixed to land, or to buildings upon the land, as to become in fact part thereof; so that such fixtures become presumptively the property of the owner of the land and pass with the ownership. the meaning expressed in the maxim of the civil law, quicquid plantatur solo, solo cedit. The word is also used in a secondary sense to mean such things as, being fixtures in the above primary sense, are nevertheless, by reason of their special nature or circumstances, removable from the land by a tenant of a limited estate as against the landlord or reversioner, and are therefore specially called "tenant's fixtures" (a).—Accordingly, fixtures presumptively pass

with the land by descent to the heir of an estate of inherit-

ance, in fee simple or in tail, as forming part of the subject of inheritance. They pass with the land to the executor of a deceased tenant for years; and upon the ex-

Fixtures pass with the land.

Fixtures pass to purchaser.

To tenant for life or years.

piration of the term they pass to the reversioner, subject to the distinction of removable or tenant's fixtures (b). And a devise or bequest by will of a house or land primâ facie passes the fixtures without special mention (c).—Upon the same principle a conveyance of a house or land, in the absence of any reservation or exception, passes the fixtures to a purchaser without expressly mentioning them; and they are presumptively paid for in the price (d). A conveyance expressly including "fixtures" has the same effect, and no more; it does not, in the absence of special circumstances, extend the operation of the conveyance to things not strictly speaking fixtures (e). A compulsory purchase of land by a railway company under the Lands Clauses Act includes the fixtures; the company are bound to take them as part of the land if the tenant requires it, though they may be tenant's fixtures removable as against his landlord (f).—So a lease for life or for years presumtively passes all the then existing fixtures; and the severance of such fixtures by the tenant for life or for years primâ facie constitutes waste of the inheritance for which he is responsible to the reversioner. If wrongfully severed, the tenant retains no right to use them during his term, but they become absolutely vested, as personal chattels, in the landlord or reversioner, in the same manner as the latter becomes entitled to the immediate possession of timber or minerals wrongfully severed from the inherit-Fixtures annexed by the tenant during his tenancy are primâ facie in the same legal position as to

<sup>(</sup>b) Fisher v. Dickson, 12 Cl. & F.312; Bain v. Brand, L. R. 1 Ap.Ca. 762.

<sup>(</sup>c) Beck v. Rebow, 1 P. Wms, 94; Finney v. Grice, L. R. 10 C. D. 13; 48 L. J. C. 247, cited post, p. 111. (d) Colegrave v. Dias Santos, 2 B.

<sup>&</sup>amp; C. 76.
(e) Wiltshear v. Cottrell, 1 E. &

B. 674. (f) Gibson v. Hammersmith Ry., 32 L. J. C. 337.

<sup>(</sup>g) Farrant v. Thompson, 5 B. & Ald. 826; ante, p. 37.

ownership as those annexed before the lease, and they cannot be removed by the tenant without committing waste; but the exception is here made of "tenant's fixtures" or fixtures in the secondary sense above mentioned (h). Accordingly two general rules have been laid down: "one of these rules is the rule that whatever is fixed to the freehold of land becomes part of the freehold or inheritance. The other is that whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of waste. To the first rule there is no exception whatever. But to the second rule, namely, the irremovability of things fixed to the inheritance, there is ground for the important exception of tenant's fixtures" (i).—Upon the same principle a mortgage of land Mortgagee. or houses presumptively passes all fixtures to the mortgagee as part of his security, without special mention; whether the property be freehold or leasehold, and whether the fixtures be removable or not; also fixtures annexed by the mortgagor subsequently to the mortgage become part of the security. The claim of the mortgagee to the fixtures is prior to any claim created by subsequent dealings of the mortgagor, and is secured against all other creditors in the event of his bankruptcy (j). An equitable mortgage has the same effect as a legal mortgage upon the fixtures; the question as to what is included in the subject of mortgage being the same in both (k). A mortgagor in possession retains no right of removing "tenant's fixtures" nor does he acquire any right of removing "tenant's fixtures" annexed by him subsequently to the

<sup>(</sup>h) Co. Lit. 53 a; Elwes v. Mawe, 3 East, 38; 2 Smith's L. C.; Buckland v. Butterfield, 2 B. & B. 54; 10 Lyncourt v. Gregory, L. R. 3 Eq. 382; 36 L. J. C. 107.
(i) Cairns, L. C. Bain v. Brand, L. R. 1 Ap. Ca. 767.

<sup>(</sup>j) Longstoff v. Meagoe, 2 Ad. & El. 167; Hitchman v. Walton, 4 M.

<sup>&</sup>amp; W. 409; Mather v. Fraser, 2 K. & J. 536; 25 L. J. C. 361. See Holland v. Hodgson, L. R. 7 C. P. 340; 41 L. J. C. P. 146; Meux v. Jacobs, L. R. 7 H. L. 481.

<sup>(</sup>k) Meux v. Jacobs, supra; Longbottom v. Berry, L. R. 5 Q. B. 123; 39 L. J. Q. B. 37.

mortgage; he is not in the relation of tenant to the mortgagee for this purpose (1). And the ordinary attornment clause in a mortgage is construed as a further security only, without taking away from the character of the mortgage or altering its incidents (m). But in a mortgage by underlease of premises containing tenant's fixtures the right of removal and disposal of such fixtures does not pass to the mortgagee unless expressly conveyed; the underlease presumptively carries only the use of all existing fixtures, as it does the use of the land during the term, leaving the right of removal to the mortgagor at the end of the term (n). In the case of a lease made by a mortgagor in possession, the lessee has the same right to remove fixtures against the mortgagee as against his lessor, such lease being presumptively made with the acquiescence of the mortgagee (o). If it be intended that fixtures shall not be included in a mortgage, the terms of the mortgage deed must express that intention; so if it be intended that some fixtures should pass and others not (p); or if it be intended that some things should be mortgaged with the land which are not strictly fixtures (q). But in the absence of an intention to the contrary expressed in the mortgage deed, it will pass all fixtures; and the express mention of some of the fixtures is not sufficient alone to exclude the others not mentioned (r). A mortgage gives no implied power to sever fixtures; nor does a power in a mortgage deed to sell the land or any part thereof, unless

<sup>(</sup>l) Walmsley v. Milne, 7 C. B. N. S. 115; 29 L. J. C. P. 97; Cullwick v. Swindell, L. R. 3 Eq. 249; 36 L. J. C. 173; Climie v. Wood, L. R. 4 Ex. 328; 38 L. J. Ex. 223; Longbottom v. Berry, L. R. 5 Q. B. 137; 39 L. J. Q. B. 37; Cross v. Barnes, 46 L. J. Q. B. 479.

<sup>(</sup>m) Ex parte Punnett, Re Kitchin, L. R. 16 C. D. 226; 50 L. J. C. 212.

<sup>(</sup>n) Southport Banking Co. v. Thompson, L. R. 37 C. D. 64; 57

L. J. C. 114.

<sup>(</sup>o) Sanders v. Davis, L. R. 15 Q. B. D. 218; 54 L. J. Q. B. 576.

<sup>(</sup>p) Trappes v. Harter, 2 C. & M. 153; Waterfall v. Penistone, 6 E. & B. 876; 26 L. J. Q. B. 100; explained in Walmsley v. Milne, 7 C. B. N. S. 133.

<sup>(</sup>q) Steward v. Lombe, 1 B. & B. 506.

<sup>(</sup>r) Southport Banking Co. v. Thompson, L. R. 37 C. D. 64; 57 L. J. C. 114.

power is expressly given to sever the fixtures and sell them as personal chattels (s).

If a person builds or erects anything upon the land of Fixtures upon another with his own materials, the building or erection another. becomes a fixture according to the above principle, and is presumptively the property of the owner of the land as if it had been made with his materials; but the presumption may be rebutted by the circumstances (t). Thus, where a fixture is made upon the land of another in exercise of an easement or right over it; as in the case of an easement appurtenant to a mill of keeping a hatch upon the mill stream to regulate the flow of water (u); an easement appurtenant to a wharf of fixing mooring piles in the bed of the adjacent river (v); an easement subsidiary to rights of mining, of erecting mining machinery and buildings upon the surface of the land (w). In all these cases there is an easement of placing certain fixtures upon the land, which remain the property of the owner of the easement and are removable by him, and which pass with the easement and not with the land (x). And the possession of fixtures separately from the land or building to which they are fixed may be the subject of rating; as in the case of telegraph posts and wires fixed by licence of the owners of land (y). Where a person built a public bridge with his own materials upon the land of another person who granted leave for the purpose, it was held that the materials of the bridge remained the property of the person who built it, subject to the use by the public; and that on the bridge being removed the materials reverted to him absolutely (z).—On the other hand, if a person

<sup>(</sup>s) Re Yates, L. R. 38 C. D. 112; 57 L. J. C. 697.

<sup>(</sup>t) Marshalls v. Ulleswater Co., L. B. 7 Q. B. 166; 41 L. J. Q. B. 41; Chitty, J., Elwes v. Briggs Gas Co., L. R. 33 C. D. 567; 55 L. J. C.

<sup>(</sup>u) Wood v. Hervett, 8 Q. B. 913. (v) Lancaster v. Eve, 5 C. B. N. S. 717; 28 L. J. C. P. 235.

<sup>(</sup>w) Wake v. Hall, L. R. 8 Ap. Ca. 195; 52 L. J. Q. B. 494. See Topham v. Greenside Brick Co., L. R. 37 C. D. 281; 57 L. J. C. 583.

<sup>(</sup>x) See post, p. 199.

<sup>(</sup>y) Lancashire Telephone Co. v. Manchester, L. R. 14 Q. B. D. 267; 54 L. J. M. 63.

<sup>(</sup>z) Harrison v. Parker, 6 East,

builds upon his own land with the materials of another, the property in the materials is not changed against the will of the owner; and though the latter may not be allowed under the circumstances to destroy the building for the sake of the materials, he seems entitled at least to recover the value from the builder who has converted them to his own use (z).

What things are fixtures.

The annexation to the land or building sufficient to constitute a fixture, "is a question which must depend upon the circumstances of each case, and mainly on two circumstances as indicating the intention, viz., the degree of annexation and the object of the annexation." An article attached to the land by its own weight only is primâ facie to be considered a mere chattel; but it may be a fixture by reason of an apparent intention to make it pass with the land. Thus blocks of stone placed upon one another to form a wall, though without any mortar or cement. become fixtures; but the same blocks of stone stacked as material in a builder's yard remain chattels. On the other hand, an article annexed to the land, however slightly, is primâ facie to be considered as a fixture unless the circumstances are such as to show that it was intended to continue a chattel (a).

Fixtures for use of land.

Things annexed for the profitable use of land, as fences, walls, and palings, are fixtures which pass with the land; also live hedges, and plants of all kinds growing in the soil, as a border of box plants, and a bed of strawberry plants; and if a tenant remove or destroy such things, though made or planted by himself, it is presumptively waste (b). Accretions to the soil become part of the land and pass with it, as sand drifted by the wind, or stones fallen

<sup>(</sup>z) Brooke's Abr. cited in Lancaster v. Eve, 5 C. B. N. S. 721; the civil law cited by L. Blackburn, Wake v. Hall, L. R. 8 Ap. Ca. 203; 52 L. J. Q. B. 494.

<sup>(</sup>a) Holland v. Hodgson, L. R. 7 C. P. 334; 41 L. J. C. P. 149. (b) Watherell v. Houells, 1 Camp. 227; Empson v. Soden, 4 B. & Ad. 655.

from an adjoining cliff (c). Manure spread on the land becomes part of the soil, though while laid in heaps it is a chattel (d).—Buildings and constructions upon land are in Buildings. general fixtures; as a conservatory built upon a brick foundation and opening into a room of a dwellinghouse (e); a veranda annexed to the outside of a house (f); a fixed ladder giving access to an upper room; and a crane annexed to the wall of a house (g). A railway or tramway constructed by sinking or fixing sleepers in the ground, whether with or without ballast, is in general a fixture; and the rails fixed upon the sleepers are considered as forming part of the whole (h).

Things annexed for the purpose of carrying on a trade Fixtures for or business upon the land or buildings are fixtures; as trade. farm buildings (i), and the fittings of a public house (j).— The machines in a mill or manufactory, though fixed only Machinery. by nails, bolts, screws or plugs for the purpose of working them, are considered as part of the building and primâ facie pass with a conveyance or mortgage (k). But looms in a cotton mill annexed only by letting the legs into sockets placed in the floor for that purpose, from which they could be removed by mere lifting, were held not to be fixtures (1). And similar machines fixed to the floor have been held to be distrainable for rent as movable chattels,

(c) Blewett v. Tregonning, 3 A. & E. 554; Dearden v. Evans, 5 M. &

(d) Yearworth v. Pierce, Aleyn, 32; Sty. 66; Wms. Ex. 615, 4th

(e) Buckland v. Butterfield, 2 B. & B. 54. See Moss v. James, 47 L. J. C. P. 160.

(f) Penry v. Brown, 2 Stark,

(g) Wilde v. Waters, 16 C. B. 637; 24 L. J. C. P. 193.

(h) Ex parte Moore's Banking Co., Re Armytage, L. R. 14 C. D. 379; 49 L. J. B. 60; Turner v. Cameron, L. R. 5 Q. B. 306; 39 L. J. Q. B. 125. See Beaufort v. Bates, 3 D. F. & J. 381; 31 L. J. C. 481.

(i) Elwes v. Mawe, 3 East, 38; 2 Smith, L. C.

Smith, L. C.

(j) Ex parte Gawan, Re Barclay,
5 D. M. & G. 403; 25 L. J. B. 1;
Walmsley v. Milne, 7 C. B. N. S.
115; 29 L. J. C. P. 97.

(k) Mather v. Fraser, 2 K. & J.
536; 25 L. J. C. 361; Boyd v.
Shorrock, L. R. 5 Eq. 72; 37 L. J.
C. 144; Longbottom v. Berry, L. R.
5 Q. B. 123; 39 L. J. Q. B. 37;
Sheffield v. Harrison, L. R. 15 Q. B.
D. 358: 54 L. J. Q. B. 16: Holland D. 358; 54 L. J. Q. B. 15; Holland v. Hodgson, L. R. 7 C. P. 328; 41 L. J. C. P. 146.

(l) Hutchinson v. Kay, 23 Beav. 413; 26 L. J. C. 457.

but this decision has been questioned (m). A steam crane bedded in mortar and fixed by bolts to a bed of stone for the purpose of working a quarry (n), also a "portable engine," fixed to a foundation of brickwork for the temporary purpose of sinking a new colliery shaft, were held to have become fixtures, so as to pass to a mortgagee of the premises, as part of his security (o).—Fixtures of the above kind, annexed for the purposes of trade or manufacture belong for the most part to the class of fixtures which are removable by tenants of particular estates as against the landlord or reversioner (p).

Fixtures for domestic use.

Things annexed to a house for permanent domestic use are fixtures: doors, windows, wainscot, shutters and blinds, fixed tables and benches, fixed cupboards, furnaces, grates, chimney pieces, stoves, ovens, coppers, cauldrons, bells and bell hangings, and all like things are prima facie considered as part of the house and pass with it; though some of them may at the same time be removable as being "tenant's fixtures" (q). "Glass annexed to windows is parcel of the house, and shall descend to the heir; and although the lessee himself at his own cost put the glass in the windows yet being once parcel of the house he could not take it away or waste it" (r). A covenant by a lessee to deliver up the premises at the end of the term "with all windows," &c., was held to include a plate glass shop front erected by him (s). Wall papers, tapestries, pannelling, and other like materials annexed to the walls of a house in a manner to form the surface of the walls, are fixtures as forming part of the wall (t).—On the

(m) Hellawell v. Eastwood, 6 Ex. 310; 20 L. J. Ex. 154; Longbottom v. Berry, Holland v. Hodgson, supra.

(n) Ex parte Moore's Banking Co., Re Armytage, L. R. 14 C. D. 379; 49 L. J. B. 60.

(a) Cross v. Barnes, 46 L. J. Q. B. 479; Walmsley v. Milne, 7 C. B. N. S. 115; 29 L. J. C. P. 97.

(p) Post, p. 114.
(q) Co. Lit. 47 b, 53 a; 4 Co.

63 b, Herlakenden's case; 11 Co. 50 b, Liford's case; The King v. St. Dunstan, 4 B. & C. 686; Lyde v. Russell, 1 B. & Ad. 394.

(r) 4 Co. 63 b, Herlakenden's case; Maule, J. Bishop v. Elliott, 11 Ex. 113; 24 L. J. Ex. 230.

(s) Burt v. Haslett, 18 C. B. 893; 25 L. J. C. P. 295. (t) D'Eyncourt v. Gregory, L. R. 3 Eq. 382; 36 L. J. C. 107.

other hand articles of household furniture or ornament Furniture. which are annexed merely for the purpose of their proper and convenient use or display are not considered as fixtures:—as carpets nailed to floors, curtains, hangings and the like (u), beds nailed or fastened to the walls or floors (x), chimney and pier glasses, frames and pictures, which are fixed to the wall, but not as part of the wall. Such articles are considered to remain personal chattels and do not pass with the freehold (y). They pass under a bequest of "furniture" or "fixed furniture;" but these terms will not apply to pass fixtures strictly so called, though removable as "tenant's fixtures" (z).

Some things, though not annexed to land or building, Accessories to are considered fixtures, as being accessories or appurtenances to other fixtures, according to the maxim Accessio cedit principali. Thus the keys of doors form part of the house to which the door belongs (a). All the essential parts of a fixed machine, though detached, form part of the machine as a fixture, as the mill stones of a mill (b); the anvil of a steam hammer (c); the driving belts of machinery (d); duplicate parts of a machine, though not actually annexed for use; but parts prepared for a machine, if not yet fitted, remain chattels (e).—To this principle may be referred the following fixtures: walls built of loose stones annexed only by their own weight (f); pavements made with stones or other materials laid upon the

<sup>(</sup>u) Hellawell v. Eastwood, 6 Ex. 313; 20 L. J. Ex. 160; Finney v. Grice, L. R. 10 C. D. 13; 48 L. J.

C. 247.

(x) Ex parte Quincy, 1 Atk. 478.

(y) Beck v. Rebow, 1 P. Wms. 94;

D' Eyncourt v. Gregory, L. R. 3 Eq.

382; 36 L. J. C. 107.

(z) Birch v. Davson, 2 A. & E.

37; Paton v. Sheppard, 10 Simon,

186; Finney v. Grice, supra.

(a) Liford's Case, 11 Co. 50.

(b) Walmsley v. Milne, 7 C. B. N.

S. 115; 29 L. J. C. P. 97; Place

v. Fagg, 4 M. & R. 277; Martyr v. Bradley, 9 Bing. 24.

<sup>(</sup>c) Metrop. Ass. v. Brown, 26 Beav. 454; 28 L. J. C. 581.

<sup>(</sup>d) Longbottom v. Berry, L. R. 5 Q. B. 123; 39 L. J. Q. B. 37; Sheffield Building Soc. v. Harrison, 54 L. J. Q. B. 15; L. R. 15 Q. B. D. 358.

<sup>(</sup>e) Ex parte Lloyd's Banking Co., L. R. 4 Ch. 630; 38 L. J. B. 9. (f) Holland v. Hodgson, ante.

ground (g); sculptures placed in position merely as architectural ornaments or accessories to a building, in distinction to sculptures intended as separate objects independent of position (h).

Movable buildings, &c.

Things not annexed, otherwise than resting by their weight upon the ground, prima facie remain chattels, which do not pass with the land: a barn, granary or other like building framed separately of wood and resting merely by its own weight upon staddles of brick and stone built into the ground remains a movable chattel; but the staddles are fixtures and go with the land (i). A covenant by a lessee to deliver up "all erections and buildings" upon the demised premises was construed not to include a building of this kind, which remained a mere chattel (k). A cottage framed on posts was held not to be fixed to the ground, although the posts had partly sunk into the ground by the weight of the building (l). So, a windmill may be placed upon the ground or upon a brick foundation, to be used as a chattel (m); and a weighing machine placed for use in a hole lined with brickwork (n).

Tenant's fixtures.

"Tenant's fixtures" are those things which, having been annexed as fixtures, in the above meaning of the term, by the tenant of a particular or limited estate, may yet be removed by him during his tenancy; thus making an exception to the general rule above stated that a tenant cannot remove fixtures without committing waste. "The term 'fixture' is an ambiguous one. It has been defined to be such an annexation as can be removed from land by the party annexing it, adversely to the owner; but in its

<sup>(</sup>g) Ex parte Lloyd's Banking Co., L. R. 4 Ch. 638; 38 L. J. B. 9. See Metropol. Ass. v. Brown, 26 Beav. 454; 28 L. J. C. 581.

<sup>(</sup>h) D'Eynocurt v. Gregory, L. R. 3 Eq. 382; 36 L. J. C. 107.
(i) Crolling v. Tuffnull, Bull. N. P. 34; Wansbrough v. Maton, 4 A.

<sup>&</sup>amp; E. 884; Wiltshear v. Cottrell, 1 E. & B. 674; 22 L. J. Q. B. 177.

<sup>(</sup>k) Naylor v. Collinge, 1 Taunt.

<sup>(</sup>l) Huntley v. Russell, 13 Q. B.

<sup>(</sup>m) The King v. Londonthorpe, 6 T. R. 377; The King v. Otley, 1 B. & Ad. 161; Steward v. Lombe, 1 B.

<sup>(</sup>n) Ex parte Lloyd's Banking Co., L. R. 4 Ch. 630; 38 L. J. B. 9.

more general sense it means any annexation or addition which has been annexed to or planted in the soil of the land" (o).—This distinction has no application to a tenancy Tenant in fee in fee simple; because tenant in fee simple in possession has the absolute ownership and power of disposal of the land and of everything annexed to it; and upon his death they pass to the heir or devisee. A tenant in fee simple is presumed to annex fixtures for the improvement of the inheritance, and the representative of his personal estate can claim such things only as are, actually or constructively, not fixtures at all; such as ornaments, pictures, furniture and the like, which, though fixed, are so only for the purpose of being more conveniently used or seen, and not with any intention of annexing them to the land or house (p). Accordingly it is said that, "between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom and to consider as a personal chattel anything which has been affixed thereto "(q).

But the tenant of a limited estate is presumed to annex Tenant of fixtures for the purpose of improving his own use and occupation, and not with any view of improving the reversion, in which he has no interest. He is, therefore, allowed the right of removing the fixtures which he has thus annexed. This right of removal is allowed in the cases of tenant in tail, tenant for life and tenant for years, by reason of their limited estates. But it is said that "the case between executor of tenant for life or in tail and the remainderman, is not so strong as between landlord and tenant, though the same reason governs it." There seems, however, to be little or no practical difference between the cases (r).—A mortgagor in possession is not

limited estate.

<sup>(</sup>o) Per cur. Climie v. Wood, L. R. 3 Ex. 260; 38 L. J. Ex. 223; ante, p. 105.

<sup>(</sup>p) Ante, p. 111; Wms. Ex. p. 616, 3rd ed.; Lawton v. Salmon, 1 H. Bl. 259, n.; Fisher v. Dickson,

<sup>12</sup> Cl. & F. 312; Bain v. Brand, L. R. 1 Ap. Ca. 762.

<sup>(</sup>q) Ellenborough, C. J. Elwes v.

Mave, 3 East, 51. (r) Hardwicke, L. C. Dudley v. Warde, Ambl. 114; Elwes v. Mawe,

in the position of a tenant of a limited estate in relation to the mortgagee for the purpose of removing tenant's fixtures during his possession; but all fixtures pre-

sumptively vest in the mortgagee (s).

The fixtures which are removable as being "tenant's fixtures" are ascertained specifically from the decisions of the Courts; which proceed upon the general principle in favour of the tenant that "such things as are ordinarily affixed to the freehold for the convenience of the occupier, but which may be removed without material injury to the freehold, when affixed by the tenant, may, on certain conditions, be removed by him" (t).—Accordingly things annexed for the purpose of trade are tenant's fixtures, which may be disannexed and removed during the term; as the vats, coppers and pipes of a brewer, or of a soapboiler, or of any other like trade (u); the fittings of a public house or tavern (x); the buildings, engines and machinery erected for the purpose of mining; and the executor of tenant for life or in tail may claim such things (y). In the case of a market gardener, conservatories, greenhouses, and hot-houses built for the purpose of the trade; also trees, shrubs and flowers planted for the purpose of the trade, are tenant's fixtures, which he has the right to remove, though under other circumstances than as trade fixtures such things are not removable (z).— Things annexed for the convenient use of the house are tenant's fixtures: as stoves, grates, coppers and the like; pumps for drawing water; bells and bell fittings (a). Things annexed for ornament of a house or building are

Trade fixtures.

Domestic fixtures.

Ornamental fixtures.

(s) Ante, p. 105.

ton v. Robart, 2 East, 88. (x) Elliott v. Bishop, 10 Ex. 496; 24 L. J. Ex. 229.

394.

<sup>3</sup> East, 51; Wms. Ex. 4th ed.

<sup>(</sup>t) Cranworth, L. C. Ex parte Gowan, Re Barclay, 5 D. M. & G. 403; 25 L. J. B. 3. (u) Poole's Case, 1 Salk. 368; Lawton v. Lawton, 3 Atk. 15; Pen-

<sup>(</sup>y) Wake v. Hall, L. R. 8 Ap. Ca. 195; 52 L. J. Q. B. 494; Lawton v. Lawton, supra; Dudley v. Warde, Ambl. 113.

<sup>(</sup>z) Per cur. Penton v. Robarts, 2 East, 90; see Empson v. Soden, 4 B.

<sup>&</sup>amp; Ad. 655; ante, p. 108.
(a) Grymes v. Boweren, 6 Bing.
439; see Lyde v. Russell, 1 B. & Ad.

in general regarded as tenant's fixtures (b). An ornamental chimney-piece belongs to this class and is removable, though an ordinary plain chimney-piece is held not to be removable; and in this regard, a chimney-piece is not to be considered as ornamental merely because the material is marble (c). Articles of household furniture that are annexed Furniture. merely for the convenient use of the things themselves and not as accessory to the use of the house remain chattels notwithstanding the annexation, and are removable as chattels; such as carpets, curtains, mirrors and the like. The term "household furniture" is not, in general, construed to include tenant's fixtures; and where the house was left by will to one person and the "household furniture" to another, it was held that the tenant's fixtures went with the house (d).

At common law agriculture was considered not to be Agricultural a trade within the privilege, and the tenant in agriculture fixtures. had no general right to remove buildings and fixtures erected for merely agricultural purposes (e); but his position is now largely regulated by statute. By "An Act to improve the Law relating to Agricultural Tenants' Fixtures," 14 & 15 Vict. c. 25, s. 3, buildings, engines, or machinery, erected by a tenant, with the consent of the landlord, for agricultural purposes, were made the property of the tenant, and removable by him, subject to an election in the landlord to purchase them. By "The Agri- Agricultural cultural Holdings Act, 1883," 46 & 47 Vict. c. 61, s. 1, the tenant of an agricultural holding is given the right to obtain from his landlord compensation for buildings, fixtures and improvements of certain kinds specified in the schedule to the Act. And it is further provided by s. 34, that "where a tenant affixes to his holding any engine, machinery, fencing or other fixture, or erects any building,

Holdings Act.

<sup>(</sup>b) Per cur. Buçkland v. Butter-field, 2 B. & B. 58. (c) Elliott v. Bishop, 10 Ex. 522; 24 L. J. Ex. 229.

<sup>(</sup>d) Finney v. Grice, L. R. 10 C. D. 13; 48 L. J. C. 247; ante, p. 111.
(e) Elwes v. Mawe, 3 East, 38; 2 Smith, L. C.

for which he is not entitled to compensation, then such fixture or building shall be the property of and removable by the tenant before or within a reasonable time after the termination of the tenancy." But the right of removal thus given is subject to the conditions imposed by the section, as to payment of all rent owing, repair of damage by the removal, notice to the landlord, and election by him to purchase.

Right of removal during tenancy.

The tenant's right to remove fixtures, in the absence of special agreement respecting it, must be exercised before giving up possession at the termination of the tenancy. By then quitting possession he abandons his right; he cannot afterwards enter to remove them; nor can be recover them, if afterwards severed, or their value; "they become a gift in law to him in reversion" (f). The right of removal is limited to possession under the tenancy, whether the tenancy is determined by lapse of time; or by re-entry of the landlord under a condition of forfeiture (g); or by surrender, in fact or in law (h); or by a mortgagee taking possession or selling (i). But "in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord; or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove them with his goods and chattels off the demised premises; or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred to. the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy" (k).

<sup>(</sup>f) Holt, C. J., Poole's Case, 1 Salk. 368; Lyde v. Russell, 1 B. & Ad. 394; Leader v. Homewood, 5 C. B. N. S. 546.

<sup>(</sup>g) Minshall v. Lloyd, 2 M. & W. 450; Pugh v. Arton, L. R. 8 Eq. 626; 38 L. J. C. 619; Ex parte

Gould, L. R. 13 Q. B. D. 454. (h) Moss v. James, 47 L. J. C. P. 160; Ex parte Brook, L. R. 10 C. D. 100; 48 L. J. B. 22.

<sup>(</sup>i) See ante, p. 105; and see. Sanders v. Davis, ante, p. 106. (k) Per cur. Ex parte Brook, L. R.

If a tenant surrenders his lease after having assigned the fixtures to another, the surrender is subject to the prior right of the assignee, who is entitled to a reasonable time for removing the fixtures after receiving notice of the surrender (l).

By express covenant or agreement in leases, fixtures not Covenants otherwise removable may be treated by the parties as and agreements as to removable, and tenant's fixtures may be treated as removal of irremovable, and the time for removal may be enlarged or restricted. Where the lease stipulated that the lessee should provide and maintain the fixtures suitable for a certain business, and that in case of the determination of the lease by lapse of time, but in no other case, he should remove them; the lessee was held to have renounced his ordinary right as a tenant to remove the fixtures during the continuance of the term (m). Where the lease provided that certain buildings and other fixtures should be the property of the lessee, it was held that they remained his absolute property notwithstanding a forfeiture of the lease by his bankruptcy, and that the receiver in bankruptcy was entitled to claim them from the lessor (n). "Where there is an express contract that the tenant shall have a right to remove fixtures, that does not mean that the moment the term ends or is forfeited he loses his right, but that he must have a reasonable time after the lease determines" (o). "Such a stipulation would operate as an enlargement of the term, not for all purposes but so far as to give to the tenant the right to remove his goods, and to do all things necessary for that purpose; a

<sup>10</sup> C. D. 109; 48 L. J. B. 25;
Weeton v. Woodcock, 7 M. & W.
19; Sumner v. Bromilow, 34 L. J. Q. B. 130.

<sup>(</sup>l) London Loan Co. v. Drake, 6 C. B. N. S. 798; 28 L. J. C. P. 297; Saint v. Pilley, L. R. 10 Ex. 137; 44 L. J. Ex. 33; Moss v.

James, 47 L. J. Q. B. 160.

<sup>(</sup>m) Dumergue v. Rumsey, 2 H. & C. 777; 33 L. J. Ex. 88.

<sup>(</sup>n) Ex parte Gould, L. R. 13 Q. B. D. 454.

<sup>(</sup>o) Pugh v. Arton, L. R. 8 Eq. 630; 38 L. J. C. 619; Stansfeld v. Portsmouth, 4 C. B. N. S. 120.

right annexed by law in the case of a tenant at will, and in that of an executor of a tenant for life" (p). Where a tenant built a greenhouse under an express undertaking by his landlord to license the removal of it during the term; it was held that the tenant might remove the greenhouse during the term or within a reasonable time after, but that he would not be allowed a further time to find a purchaser of it before removal, and that a purchaser buying it after the expiration of the term would acquire no better right (q).—A covenant by the lessee to deliver up all buildings and fixtures at the expiration of his lease is primâ facie construed strictly to include buildings and fixtures erected for trade purposes, which would otherwise be removable as tenant's fixtures (r). A covenant to yield up the demised premises "with all windows, &c., which then were or at any time thereafter should be affixed or belonging" was construed to include a plate glass shop front erected by the tenant for the purpose of his trade (s). But a covenant to leave certain specified fixtures (being landlord's fixtures), and "all other fixtures and articles in the nature of fixtures," was construed as limiting the general words to fixtures of the same kind as those specified, and therefore as not including tenant's fixtures (t). A covenant by a lessee to erect certain fixtures upon the demised premises, and to keep the premises and fixtures in repair during the term, was construed to import that the fixtures must be left at the end of the term, although there was no express covenant to that effect, because the lessee was precluded by the covenant to repair from removing them during the term (u). An express covenant in a

lease under seal to deliver up all buildings and fixtures at

Covenants to leave fixtures.

<sup>(</sup>p) Willes, J. Cornish v. Stubbs,
L. R. 5 C. P. 339; 39 L. J. C. P.
205; Lit. s. 69.

<sup>(</sup>q) Moss v. James, 47 L. J. Q. B.

<sup>(</sup>r) Naylor v. Collinge, 1 Taunt. 19; Martyr v. Bradley, 9 Bing. 24.

<sup>(</sup>s) Burt v. Haslett, 18 C. B. 893; 25 L. J. C. P. 295.

<sup>(</sup>t) Elliott v. Bishop, 10 Ex. 522; 24 L. J. Ex. 229; see Summer v. Bromilow, 34 L. J. Q. B. 135.

<sup>(</sup>u) Ex parte Daglish, 42 L. J. B. 102.

the end of the term could not be discharged at common law by an agreement not under seal, as in the case of a greenhouse erected by the lessee under a parol licence of the lessor to remove it when he pleased; but it seems that such a licence would be available in equity, and under the Judicature Acts would be available in all Courts (x).

Fixtures are regarded in law for most purposes as part Fixtures as of the land or tenement to which they are annexed. At subject of action. common law they were not the proper subject of an action of trover, which was the form of action provided for the recovery of goods and chattels only (y). They are not properly described as "goods and chattels sold and delivered," in an action against an incoming tenant for the price(z). The tenant in possession may claim for a wrongful severance of fixtures as a trespass to his tenement: but they become goods and chattels upon severance and may be so claimed (a).—Fixtures cannot be taken Fixtures in execution under a writ of fieri facias levied against taken in execution. the owner of the inheritance; because they are part of the freehold, and the writ can be levied only upon his goods and chattels (b). But "tenant's fixtures" may be taken and sold in an execution levied against the tenant of a limited estate; because whatever the tenant may remove the sheriff may seize for the benefit of his creditors (c). Fixtures which such tenant has no right to remove cannot be taken under an execution against him, and not even after he has severed them, for by wrongful severance they become absolutely vested in the reversioner (d). And where by the express terms of a lease the tenant renounced his right to remove tenant's fixtures during the

<sup>(</sup>x) West v. Blakeway, 2 M. & G.

<sup>729.</sup> (y) Mackintosh v. Trotter, 3 M. & W. 184; Wilde v. Waters, 16 C. B. 637; 24 L. J. C. P. 193; Sheen v. Rickie, 5 M. & W. 182. (z) Lee v. Risdon, 7 Taunt. 188. (a) Dalton v. Whitten, 3 Q. B.

<sup>961;</sup> Pitt v. Shew, 4 B. & Ald. 206; Thompson v. Pettitt, 10 Q. B. 101.
(b) Winn v. Ingilby, 5 B. & Ald.

<sup>(</sup>c) Poole's Case, 1 Salk. 368; Minshall v. Lloyd, 2 M. & W. 459. (d) Farrant v. Thompson, 5 B. &

Ald. 826.

term, it was held that they could not be taken in execution against him, because they then became the property of the landlord (e). Even in the case of a tenant "without impeachment of waste" the execution creditor has no right of taking any other than ordinary tenant's fixtures; although the tenant himself might take others with impunity; "because in that case the tenant hath only a bare power without an interest"; but after severance by the tenant the creditor might seize them (f).—Fixtures cannot be taken as a distress for rent, because they are part of the tenement out of which the rent issues, and a distress can only be taken of goods and chattels there found (a). But if "tenant's fixtures" are taken in execution by the sheriff the landlord is entitled to payment of a year's arrear of rent before removal under the statute 8 Anne, c. 14 (h).

Distress for rent.

Bankruptcy of tenant.

-ownership clause of the Bankruptcy Acts; so as to entitle the creditors of a bankrupt tenant to claim them, as against a prior assignee or mortgagee of the tenement or of the fixtures, as being "goods in the possession order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof"; because the possession of fixtures by the tenant is not as of goods but as part of his tenement (i).—The disclaimer of a lease by the trustee in bankruptcy of the lessee has the same effect as a surrender in abandoning the tenant's fixtures. It takes effect from the date of the appointment of the trustee, and puts an end to the term and the lease from that date, thereby excluding the trustee from all claim to

Fixtures are not goods and chattels within the reputed

Disclaimer of lease in bank-ruptcy.

<sup>(</sup>e) Dumergue v. Rumsey, 2 H. & C. 777; 33 L. J. Ex. 88, ante. (f) Per cur. Poole's Case, 1 Salk.

<sup>(</sup>g) Hellawell v. Eastwood, 6 Ex. 311.

<sup>(</sup>h) See post, p. 455.

<sup>(</sup>i) "Bankruptey Act, 1883," 46 & 47 Vict. c. 52, s. 44; Horn v. Baker, 9 East, 215; 2 Smith, L. C. 4th ed.; Ex parte Gawan, Re Barclay, 5 D. M. & G. 403; 25 L. J. B. 1; Whitmore v. Empson, 23 Beav. 313; 26 L. J. C. 364.

the fixtures removable during the term; and notwithstanding an express proviso in the lease allowing a certain time after the determination thereof for their removal (k). But by the Bankruptey Act, 1883, 46 & 47 Vict. c. 52, s. 55, "a trustee shall not be entitled to disclaim a lease without the leave of the Court, and the Court may, before granting such lease, require such notices to be given to persons interested, and impose such terms and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just."

Fixtures, or the right to remove fixtures, may be assigned Fixtures or reserved separately from the tenement to which they assigned separately are annexed.—A licence given by a landlord to an out- from the tenegoing tenant to leave his fixtures on the demised premises ment. after the expiration of the term, with the view of selling them to an incoming tenant, and with the right to enter and remove them, was held to grant an interest in land, and therefore to require a deed under seal (1).—A contract by Statute of an outgoing tenant with the landlord or with an incoming Frauds. tenant for leaving the tenant's fixtures is not a contract or sale of any interest in land within the fourth section of the Statute of Frauds; nor a contract for the sale of goods within the seventeenth section; and the price may be recovered as due "for fixtures sold and delivered" without any such memorandum or note in writing of the contract as is required by the statute (m).

Fixtures sold and assigned separately are subject to the Bills of Sale provisions of the Bills of Sale Acts, 1878, 1882 (41 & 42 Acts. Viet. c. 31, 45 & 46 Viet. c. 43). By sects. 8, 9 of the Act, 1882, every bill of sale of "personal chattels" is declared

<sup>(</sup>k) Ex parte Stephens, Re Lavies, L. R. 7 C. D. 127; 47 L. J. B. 22; Ex parte Brooks, Re Roberts, L. R. DATE DYONS, R.E. ROVETS, L. R. 10 C. D. 100; 48 L. J. B. 22; Exparte Glegg, Re Latham, L. R. 19 C. D. 7; 51 L. J. C. 367; see Exparte Dyke, Re Morrish, L. R. 22 C. D. 410; 59 T. J. C. 270 C. D. 410; 52 L. J. C. 570.

<sup>(1)</sup> Roffey v. Henderson, 17 Q. B. 574; 21 L. J. Q. B. 49. (m) Hallen v. Runder, 1 C. M. & R. 266; Lee v. Gaskell, L. R. 1 Q. B. D. 700; 45 L. J. Q. B. 540; Lee v. Risdon, 7 Taunt. 188; ante, p. 119.

void unless registered within seven clear days after the execution thereof, and unless it truly sets forth the consideration for which it is given, and unless made in accordance with the form given in the Schedule to the Act. sect. 4 of Act, 1878, "the expression 'personal chattels' shall mean, goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged,) fixtures; but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed." By sect. 5, "trade machinery shall for the purposes of this Act be deemed to be personal chattels," and "trade machinery means the machinery used in or attached to any factory or workshop; exclusive of the fixed motive powers, such as water-wheels and steam-engines, &c.; and exclusive of the fixed power machinery, such as shafts, wheels, drums, which transmit the action of the motive powers to the other machinery; and exclusive of pipes for steam, gas, and water. The machinery excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of the Act."—Consequently assignment of the excluded machinery does not require registration under the Act (n). And if assigned together with other personal chattels by the same deed and the securities can be separated, the deed may be valid as to such machinery, though void under the Bills of Sale Acts as to the other chattels (o). A mortgage of freeholds or leaseholds impliedly conveys all the fixtures, unless an intention to the contrary is expressed in the deed; and an express conveyance of the fixtures excluded from the operation of the above section was held not to negative the implied conveyance of all other fixtures including trade machinery (p). A mortgage of a building

Trade machinery.

<sup>(</sup>n) Topham v. Greenside Firebrick Co., L. R. 37 C. D. 281; 57 L. J. C. 583.

<sup>(</sup>o) Re Burdett, L. R. 20 Q. B. D.

<sup>310; 57</sup> L. J. Q. B. 263. (p) Southport Banking Co. v. Thompson, L. R. 37 C. D. 64; 57

L. J. C. 114.

impliedly conveys the trade machinery affixed to it, but prima facie gives no power to sever the fixtures and deal with them as personal chattels, and therefore is not a Bill of Sale; nor is it construed as such by reason of an express power of sale in general terms over the mortgaged property or any part thereof; but if the mortgagee takes a special power to sell the trade machinery separately he must register his security as a Bill of Sale (q).—By sect. 7, "No fixtures shall be deemed to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, without otherwise taking possession of or dealing with such land or building; if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, is also conveyed or assigned to the same person. The same rule of construction shall be applied to all deeds or instruments including fixtures executed before the commencement of this Act."—Under the former Bills of Sale Act, 1854, Bills of Sale repealed by the above Act, 1878, "tenant's fixtures" were Act, 1854. held to be within the Act, whether the fixtures were assigned separately or not; provided the assignee acquired the power of removing them and dealing with them as personal chattels (r).

<sup>(</sup>q) Re Yates, L. R. 38 C. D. 112; 57 L. J. C. 697. (r) Hawtry v. Butlin, L. R. 8 Q. B. 290; 42 L. J. Q. B. 163; Ex parte Daglish, Re Wilde, L. R.

<sup>8</sup> Ch. 1072; 42 L. J. B. 102; Ex parte Moore's Banking Co., Re Armytage, L. R. 14 C. D. 379; 49 L. J. B. 60.

## CHAPTER IX.

## TITLE DEEDS; HEIRLOOMS.

Property in title deeds—freehold—leasehold—mortgages—deed box—larceny of deeds.

Right of purchaser to deeds-lessee-mortgagee.

Custody of deeds—as between tenant for life and reversioner—trustee and cestui que trust—control of custody by Court—concurrent interests in same deeds—sale of land in lots.

Production of deeds for inspection—privilege of mortgagee—covenant for production—production under Conveyancing Act, 1881.

Separate property in deeds—deposit of deeds as security—lien of solicitor—adverse possession of deeds.

Heirlooms—chattels settled as heirlooms—sale of heirlooms—Settled Land Act.

Property in title deeds.

Freeholds.

Title deeds and all documents of title are regarded in law as accessories of the land to which they relate; and the property in them presumptively follows the title to the land. Accordingly, deeds and documents which relate to the inheritance of land pass by descent to the heir as incident to the inheritance, and not as personal chattels to the executor or administrator; and they pass to the lord by escheat (a). They pass to the heir of a tenant pur autre vie, who takes as special occupant, and not to the administrator (b).—Deeds and documents that relate to leasehold or chattel interests in land pass with such interests as personal estate of the deceased tenant.—Deeds of mortgage conveying the legal estate in the lands pass with the title to the land; but title deeds merely deposited

Leaseholds.

Mortgages.

<sup>(</sup>a) Shepp. Touch. 469; 1 Co. 2a, (b) Atkinson v. Baker, 4 T. R. Buckhurst's case. 229.

as security for a debt, by way of equitable mortgage, pass with the debt to the assignee or executor of the creditor (c).

The box or receptacle appropriated to keeping deeds Deed box. and documents of title is regarded in law as an accessory of the deeds and passes together with them. "The charters and the box are become one entire thing; and inasmuch as the charters are more precious than the box, therefore the heir who has the property of the charters, shall have the box also, and not the executor." But "if there be any money, plate, or any other such like thing in the chest also, the executor shall have that thing" (d).—Deeds and documents Larceny of of title are not properly described as "goods and chattels," deeds. and therefore are not a subject of the crime of larceny, or the stealing of goods and chattels, at common law; nor is the box that holds them (e). It is now provided by 24 & 25 Vict. c. 96, s. 28 (substituted for 7 & 8 Geo. IV. c. 29, s. 23), as to larceny of written instruments:--" Whosoever shall steal or for any fraudulent purpose destroy, cancel or obliterate or conceal the whole or any part of any document of title to lands shall be guilty of felony," and shall be liable to the punishment therein mentioned.

Upon a sale of land the purchaser is presumptively Right of entitled to delivery of the deeds and evidences of title; title deeds. and a conveyance of the land, primâ facie, passes the property in such documents, without express mention of them (f). The property passes upon the execution of the deed of conveyance; the solicitor or agent of the vendor thenceforth holds the deeds, if in his possession, for the purchaser only; and he retains no lien for charges against the vendor (g). If the deed of conveyance is

<sup>(</sup>c) Sheppard's Touch. 469; Wms. (e) Sheppard's Louch. 405, wills. Ex. 610, 4th ed.; Re Richardson, Shillito v. Hobson, L. R. 30 C. D. 396; 55 L. J. C. 741; post, p. 134. (d) Plowden, 323; Sheppard's Touch. 470; Wms. Ex. 610, 4th ed. (e) 3 Co. Inst. 109; Rex v. West-

beer, 2 Str. 1135.
(f) Co. Lit. 6a; Lord Buck-hurst's case, 1 Co. 1.
(g) Philips v. Robinson, 4 Bing. N. C.

<sup>106;</sup> Lord v. Wardle, 3 Bing. N. C. 680; Pratt v. Vizard, 5 B. & Ad. 808.

delivered as an escrow to take effect upon payment of the purchase-money, the property in the deeds passes conditionally upon the payment, but upon payment becomes absolute from the delivery of the deed, to the exclusion of any intermediate dealings with them (h). The purchaser. is presumptively entitled to delivery of all deeds and documents relating to the property that are in possession of the vendor, though of earlier date than the title shewn and accepted; but a covenant to produce title deeds extends only to the deeds and documents which are necessary to make a good title (i). He is also entitled to have all the deeds that are material to the title correctly stamped. A deed of mortgage which was paid off upon the occasion of the sale must be delivered to the purchaser stamped for the full amount of the mortgage at the vendor's expense, because it would not otherwise be available as evidence of the title (k).

Lessee.

A lease under seal is usually made by indentures of lease and counterpart, the former executed by the lessor and delivered to the lessee, who at the same time executes and delivers the counterpart to the lessor. The primâ facie inference is that the property in the indenture of lease belongs to the lessee, and in the counterpart to the lessor. Upon determination of the lease by lapse of time or by forfeiture, the lessor acquires no right to a return of the indenture of lease; it forms no part of his title, and remains the property of the lessee. An assignment or surrender of a lease would primâ facie carry the property in the indenture of lease with it; the title deed going with the estate in the land (l).

Mortgagee.

A mortgagee of the legal estate is in the position of a purchaser, as regards delivery of title deeds; and upon the like principle a mortgagee on being paid off is bound to

<sup>(</sup>h) Hooper v. Ramsbottom, 6 Taunt. 12.

<sup>(</sup>i) Parr v. Lovegrove, 4 Drew. 182; Cooper v. Emery, 1 Phill. 388.

<sup>(</sup>k) Re Whiting and Loomes, L. R. 17 C. D. 10; 50 L. J. C. 463. (l) Hall v. Ball, 3 M. & G. 242; Elworthy v. Sandford, 3 H. & C. 330; 34 L. J. Ex. 42.

re-deliver the deeds. After discharge of the mortgage debt he has no further interest in the land and no right to keep anything relating to it; he cannot claim to have a copy of the deed of mortgage, or of the reconveyance to the mortgagor, at his own cost or the cost of the mortgagor (m). Upon foreclosure the mortgagee, becoming absolute owner, is entitled to possession of all deeds relating to the title prior to the date of the mortgage; but he is not entitled to delivery of subsequent deeds relating to the equity of redemption (n).

In the case of land settled upon tenants for life with Custody of remainders over, the general rule is that the legal tenant deeds, as for life in possession is entitled to the custody of the title tenant for life and redeeds (o). The tenant for life holds the deeds for the versioner. benefit of all persons interested in the title; all of whom are prima facie entitled to production and inspection of the deeds when necessary for dealing with their several estates and interests; but the Court will not incidentally determine the title of a remainderman in a suit merely for the production of deeds, and will refuse production until the title is clear (p). A tenant for life can create no permanent charge or lien upon the deeds that will be available against his successor; in whom the custody of the deeds vests immediately upon the death of the tenant for life (q). A mortgagee of the remainderman is in the same position as his mortgagor as regards custody of title deeds; therefore he cannot lose priority merely by reason of not holding them during a prior tenancy for life (r).

As between trustee and cestui que trust it is, in general, Between

Between trustee and cestui que

trust.

<sup>(</sup>m) Re Wade and Thomas, L. R.
17 C. D. 348; 50 L. J. C. 601.
(n) Greene v. Foster, L. R. 22
C. D. 566; 52 L. J. C. 470.
(o) Webb v. Lymington, 1 Eden,
8; Garner v. Hannyngton, 22 Beav.
627; Allwood v. Heywood, 1 H. &
C. 745; 32 L. J. Ex. 153; Leathes
v. Leathes, L. R. 5 C. D. 221; 46

L. J. C. 562.
(p) Davis v. Dysart, 20 Beav.
405; 24 L. J. C. 381; Pennell v.
Dysart, 27 Beav. 542; Noel v.
Ward, 1 Madd. 322.
(a) Easton v. London. 33 L. J.

<sup>(</sup>q) Easton v. London, 33 L. J. Ex. 34.

<sup>(</sup>r) Tourle v. Rand, 2 Bro. C. C. 650; Farrow v. Rees, 4 Beav. 18.

the right and the duty of the trustee in whom the legal estate is vested to have the custody of the deeds, the possession of the deeds forming no part of the beneficial enjoyment of which the cestui que trust can claim to have the possession. But a bare trustee, who might be called upon to convey the legal estate, would also be bound to deliver the deeds with it (s). Where the equitable estate in land is settled upon tenants for life and in remainder, and there are no special trusts in the settlement requiring the trustees to retain possession of the deeds, the Court sanctions the rule of legal estates which entitles the tenant for life to the custody of the deeds; unless the tenant for life was himself the settlor, for in that case by holding the deeds he would be enabled to make a good title in fraud of the first settlement, and the trustee would be responsible for the consequences of giving them to him (t). The cestui que trust has a right to production and inspection and to have copies of the trust deeds and documents at his own expense (u); and these include cases and opinions of counsel taken by the trustee for guidance in the administration of the trust, the costs of which fall upon the estate as being for the benefit of all persons interested. But a mere claimant, before he has established his title, has no such rights (v).

Control of Court over custody.

The Court exercises equitable control over the custody of title deeds for the benefit of all parties interested, and if circumstances require it, may order them to be brought into Court; as where the safety of the deeds may be endangered by leaving them in the custody of a tenant for life or other person entitled to the legal custody (w). The mere fact that there is no relationship between the tenant for

<sup>(</sup>s) See Duncombe v. Mayer, 8 Ves. 320: Barclay v. Collett, 4 Bing. N. C. 658.

<sup>(</sup>t) Langdale v. Briggs, 8 D. M. & G. 391; 26 L. J. C. 40; Evans v. Bicknell, 6 Ves. 174.

<sup>(</sup>u) Ex parte Holdsworth, 4 Bing.

N. C. 386; Re Cowin, Cowin v. Gravett, L. R. 33 C. D. 179; 56 L. J. C. 78.

<sup>(</sup>v) Wynne v. Humberston, 27 Beav. 421; 28 L. J. C. 281. (w) Hardwicke, L. C. Ivie v. Ivie, 1 Atk. 431.

life and reversioner is no ground for interference (x). The Court while leaving the deeds in the custody of the tenant for life may require him to give security for their safe custody and for their production when reasonably required (y). Where the property is being administered by the Court or where there is a suit pending relating to the property requiring the presence of the deeds, the Court will order them to be brought into Court, or otherwise disposed of as most convenient for the purpose (z).

Where two or more persons have several concurrent Concurrent interests in the same deeds, the right of custody is said to interests in same deeds. be ambulatory; whoever of them obtains possession in fact (in absence of force or fraud), may keep it against the others, because as between themselves, each has an equal right to the possession. Thus in the case of joint tenants each is equally entitled to the custody of the title deeds, though on the death of one the survivor would be entitled to have them. So one of tenants in common in possession of the deeds can retain possession as against a co-tenant, who can show no better title to hold them (a). Neither of the persons so entitled can alone recover possession of the deeds from the custody of a third party, though the latter has no interest in holding them; but all parties interested must join in suing for the possession. In such case the Court would protect the interests of all at the suit of one by ordering the deeds to be deposited in Court for their inspection and use (b).—Where land held under one Sale of land title is sold in lots, the general rule, in the absence of in lots. special conditions, is that the purchaser of the lot largest in value, or the purchaser of several lots to the largest amount, is to have the custody of the deeds. So, upon the

<sup>(</sup>x) Leathes v. Leathes, L. R. 5 C. D. 221; 46 L. J. C. 562, dissenting from Warren v. Rudall, 1 J. & H. 1; 29 L. J. C. 543. (y) Jenner v. Morris, L. R. 1 Ch.

<sup>603.</sup> (z) Leathes v. Leathes, supra; Stanford v. Roberts, L. R. 6 Ch.

<sup>(</sup>a) 1 Co. 2 a, Buckhurst's Case; Yea v. Field, 2 T. R. 708; Foster v. Crabb, 12 C. B. 136; 21 L. J. C. P. 189.

<sup>(</sup>b) Wright v. Robotham, L. R. 33 C. D. 106; 55 L. J. C. 791.

sale of a part of certain land reserving the rest without any stipulation as to the custody of the deeds, they presumptively go with the part that is largest in value (e). The custody of title deeds, under such circumstances, may be specially provided for by the conditions of sale. A condition that the purchaser of "the largest lot" should have the title deeds was construed to mean the lot largest in area, without regard to value (d). And under such condition the purchaser of the largest lot is entitled to the deeds in priority to a purchaser of several other lots of greater aggregate area (e).

Production of title deeds for inspection.

A person entitled to any estate or interest in land is, in general, entitled to the production of the title deeds for his inspection by the person having the custody of them; so far as may be reasonably necessary for the protection and disposal of his estate or interest (f). A person cannot be compelled to produce his own title deeds, as such; but if the same deeds show estates or interests in others he is considered as holding them for their benefit as well as his own, and he may be compelled to produce them. Hence in an action for the recovery of land, the plaintiff, if his title be disputed, may compel the defendant to produce all deeds and documents, including his own title deeds, which tend to prove the plaintiff's title (g). If the plaintiff's title is not disputed, there is no ground for the production of the title deeds in support of it; so if the only plea is that the defendant is a purchaser for value without notice of the plaintiff's title, the deeds are presumptively not relevant to the issue, which is not as to the title, but as to notice of the title at the time

<sup>(</sup>c) Sugden, V. & P. 11th ed. 456; Dart, V. & P. 3rd ed. 94. (d) Griffiths v. Hatchard, 1 K. & J. 19; 23 L. J. C. 957. (e) Scatt v. Lackman. 21 Resv.

<sup>(</sup>e) Scott v. Jackman, 21 Beav. 110.

<sup>(</sup>f) Fain v. Ayers, 2 S. & S.

<sup>533.</sup> 

<sup>(</sup>g) Pickering v. Noyes, 1 B. & C. 262; Egremont Board v. Egremont Iron Co., L. R. 14 C. D. 158; 49 L. J. C. 623; Lyell v. Kennedy, L. R. 8 Ap. Ca. 217; 52 L. J. C. 385.

of purchase, and the plaintiff can claim production only upon the special ground that they tend to disprove the plea (h). Accordingly, in answer to the application for the production of deeds it is sufficient for the defendant to depose that they relate to his own title only, and contain nothing tending to prove the plaintiff's; it is not necessary further to depose that they contain nothing to impeach the defendant's title, because the plaintiff can only recover upon the strength of his own title, as to which the defects in the defendant's title are irrelevant, unless they also tend to prove his own (i).

By a rule of equity a mortgagee was privileged from Privilege of the production of the title deeds of the mortgaged estate mortgagee. for inspection of the mortgagor, except upon full payment of his charge (k). He was equally privileged against any person claiming under the mortgagor, or claiming any interest in the equity of redemption (1). But not against persons claiming against the mortgagor from whom he received the deeds; for they retain the same right of production and inspection of the deeds as when they were in the hands of the mortgagor (m). This rule does not extend to the mortgage deed itself, which contains the proviso for redemption, and therefore is as much the evidence of the mortgagor's title to redeem as it is of the mortgagee's estate (n). Exception is also made in cases of fraud and of other special circumstances (o).—The privilege of the mortgagee is abolished in future by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 16, enacting that "a mortgagor, as long as his right to

<sup>(</sup>h) Emmerson v. Ind, L. R. 33 C. D. 323; 55 L. J. C. 903; see Bennett v. Glossop, 3 Hare, 578.

<sup>(</sup>i) Emmerson v. Ind, supra; Horton v. Bott, 2 H. & N. 249; 26 L. J. Ex. 267; Bannatyne v. Leader, 10 Sim. 230; Smith v. Beaufort, 1

Hare, 507.
(k) Gill v. Eyton, 7 Beav. 155; Greenwood v. Rothwell, 7 Beav. 291.

<sup>(1)</sup> Browne v. Lockhart, 10 Sim.

<sup>421;</sup> Chichester v. Donegall, L. R. 5 Ch. 497; 39 L. J. C. 694.

<sup>(</sup>m) Doe d. Morris v. Roe, 1 M. & W. 207.

<sup>(</sup>n) Stuart, V.-C., Patch v. Ward, L. R. 1 Eq. 440; see Crisp v. Platel, 8 Beav. 62; Browne v. Lockhart, 10 Sim. 421.

<sup>(</sup>o) Phillips v. Evans, 2 Y. & C. 647; Kennedy v. Green, 6 Sim. 6; Livesey v. Harding, 1 Beav. 343.

redeem subsists, shall be entitled at reasonable times on his request and at his own cost, and on payment of the mortgagee's costs and expenses, to inspect and make copies or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee. This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary."

Covenant to produce title deeds.

A purchaser who cannot have the title deeds is primâ facie entitled to attested copies, at the vendor's expense, together with a covenant by the vendor to produce the deeds for inspection at all reasonable times and occasions at the expense of the purchaser; the attested copies not being available as primary evidence, except between the parties themselves (q). The right to copies and the covenant to produce extend to such deeds and documents only as are sufficient to show a good title and which cannot be obtained without recourse to the vendor; they do not include earlier deeds, nor such as can be seen upon record or otherwise, as bargains and sales enrolled, disentailing deeds, Court rolls, wills and the like (r). A covenant for further assurance includes the giving a covenant when required for production of deeds (s). The benefit of a covenant for production of title deeds runs with the purchased land; and the burden of the covenant attaches to land reserved by the vendor, so far as to bind all purchasers of the land and deeds through him or taking the deeds with notice of the covenant (t).

Production. &c. under Act, 1881.

Under the Conveyancing Act, 1881, 44 & 45 Vict. Conveyancing c. 41, s. 9, a person who retains possession of documents may give to another "an acknowledgment in writing of the right of that other to production of those documents and to delivery of copies thereof," also "an undertaking

<sup>(</sup>q) Dare v. Tucker, 6 Ves. 460; Boughton v. Jewell, 15 Ves. 176. (r) Dare v. Tucker, supra; Cooper v. Emery, 1 Phill. 388.

<sup>(</sup>s) Fain v. Ayers, 2 S. & S. 533. (t) Barclay v. Raine, 1 S. & S. 449. Sugd. V. & P. 480, 11th ed.

in writing for safe custody thereof"; and such acknowledgment and undertaking respectively have the special effects mentioned in the Act of imposing obligations respecting the documents, equivalent for the most part to the ordinary covenants for the production and custody of title deeds. The form of acknowledgment and undertaking are given in the schedule to the Act.

The property in deeds may be separated from the land Separate proto which they relate by the absolute owner assigning them deeds. to another as personal chattels. "A man may give or grant his deeds, i.e. the parchment, paper and wax, to another at his pleasure; and the grantee may keep or cancel them. And therefore a tenant in fee simple may give or grant away the deeds of his land; and the heir hath no remedy. But a tenant in tail of land cannot, as against his issue or those in reversion or remainder, give or grant any of the deeds belonging to the land entailed, no more than the land itself; he may give them during his own ownership" (u). A grant of "all goods and chattels" will not pass title deeds (v). So "if a man have an obligation he may give or grant it away and so sever the debt and it, i. e., retain the debt, while he has given away the property in the deed" (w). Thus, a bond, or a debenture of a company, or a policy of insurance may be assigned without the debt or contract to which it relates. by reason of certain formalities or conditions required to pass the latter which are not satisfied by the mere delivery of the deed. "In which cases the plaintiff may not be able to recover the document which is the evidence of the debt, while the person who holds that evidence may not be able to recover the debt itself" (x).

Where title deeds are deposited by way of equitable

<sup>(</sup>u) Sheppard's Touch. by Preston, 242; Kelsack v. Nicholson, Cro. Eliz. 496. (v) Perkins, s. 115.

<sup>(</sup>w) Sheppard's Touch. by Pres-

ton, 242.

<sup>(</sup>x) Cairns, L. C., Rummens v. Hare, L. R. 1 Ex. D. 169; 46 L. J. Ex. 30; Burton v. Gainer, 3 H. & N. 387; 27 L. J. Ex. 390.

Deposit of deeds as security. mortgage, the mortgagee acquires a special property in the deeds to hold them as security for the debt, and he can assign this property with the debt, but he cannot give any greater property in the deeds than he has himself, and therefore no right to hold the deeds apart from the debt; consequently where a mortgagee by deposit made a voluntary gift of the debt and delivered the deeds to the donee, the gift of the debt being void for want of assignment in writing, it was held that no property passed by delivery of the deeds, and the donee could not retain them against the administrator of the donor in whom the mortgage debt vested (y). A mortgagee by deposit of deeds, having only an equitable charge upon the land, is postponed to prior claimants, according to the general rule of priority in equity, although he advanced the money without notice of such claims. The possession of the deeds gives him no preferential charge, but it seems that he cannot be deprived of them in favour of a prior merely equitable claim of which he had no notice; against which he may take whatever advantage may be derived from the bare possession of the deeds (z). A purchaser or mortgagee of the legal estate is in general entitled to possession of the deeds, and may recover the possession from an equitable mortgagee; unless he originally took the legal title with notice of the charge, or unless by fraud or negligence he has assisted or acquiesced in the creation of it (a).

Lien of solicitor on deeds, A solicitor has a general lien for professional charges upon all the deeds and documents of a client in his possession. A client who discharges his solicitor without satisfying this lien cannot compel the solicitor to deliver up the deeds or to produce them for inspection; but the solicitor who discharges himself, though he retains the lien, may be

 <sup>(</sup>y) Re Richardson, Shillito v.
 Hobson, L. R. 30 C. D. 396; 55
 L. J. C. 741.

<sup>(</sup>z) Re Morgan, Pilgrem v. Pilgrem, L. R. 18 C. D. 93; 50 L. J. C. 654; Heath v. Crealock, L. R. 10

<sup>Ch. 22; 44 L. J. C. 157; Manners
v. Mew, L. R. 29 C. D. 725; 54
L. J. C. 909.</sup> 

<sup>(</sup>a) Newton v. Beck, 3 H. & N. 220; 27 L. J. Ex. 272; Manners v. Mew, supra.

compelled to produce the deeds (b).—A solicitor retained to make a mortgage by both parties cannot retain any prior lien against the mortgagor; his duty to the mortgagee being to retain possession of the deeds clear of all prior incumbrances (c); nor can he acquire any subsequent lien against the mortgagor, his possession of the deeds being exclusively that of the mortgagee (d). On the other hand, the mortgagee's solicitor can acquire no lien as against the mortgagor, who is entitled to redeem the mortgage and recover the deeds upon paying off the debt and costs (e). So, a solicitor who takes a mortgage from his client holds the deeds in his own right as mortgagee; and cannot claim any lien beyond the mortgage debt and costs (f). A solicitor can have no lien beyond the interest which his client has in the deeds (g). And he cannot refuse to produce them for inspection by other parties who are interested in the same deeds, upon proper occasions (h). He is obliged to produce the deeds in suits for the administration of the estate of his client (i); and in proceedings in bankruptcy or liquidation (k), subject to his lien.

The possession of title deeds is always presumed to be in Adverse posaccordance with the title to the land and on behalf of the session of deeds. owner, until it is shown to be adverse. Hence if the land and the deeds are in the possession of the same person, he holds the deeds as owner, or for the owner, of the land; and a claim of ownership of the land and deeds is not

<sup>(</sup>b) Heslop v. Metcalfe, 3 M. & C. 183; Cane v. Martin, 2 Beav. 584; Re Faithfull, L. R. 6 Eq. 325. See Re Wadsworth, L. R. 34 C. D. 155; 56 L. J. C. 127.

<sup>(</sup>c) Re Nicholson, Ex parte Quinn, 53 L. J. C. 302; Re Mason and Taylor, L. R. 10 C. D. 729; 48 L. J. C. 193.

<sup>(</sup>d) Ex parte Fuller, L. R. 16 C. D. 617; 50 L. J. C. 448. (e) Hollis v. Claridge, 4 Taunt. 807; Wakefield v. Newbon, 6 Q. B.

<sup>(</sup>f) Sheffield v. Eden, L. R. 10 C. D. 291.

<sup>(</sup>g) Hollis v. Claridge, 4 Taunt. 307.

<sup>(</sup>h) Brassington v. Brassington, 1 Sim. & Stu. 455; Hope v. Siddell, 20 Beav. 438; 24 L. J. C. 691. (i) Belaney v. Ffrench, L. R. 8 Ch. 918; 43 L. J. C. 312; Re Boughton, L. R. 23 C. D. 169.

<sup>(</sup>k) Re Toleman and England, L. R. 13 C. D. 885; Re Capital Fire Ins., L. R. 24 C. D. 408; 53 L. J. C. 71.

barred, as to the deeds, by adverse possession for any period short of that which bars a claim to the land (m). A separate possession of the deeds is also held presumptively on behalf of the title, and the Statute of Limitations does not begin to run against the claim of the owner of the land to have the deeds, until an adverse possession is set up, by a refusal to deliver them up when demanded or by the exercise of some other act of ownership over them (n).

Heirlooms.

"Heirlooms" in ancient times were chattels which by special custom of an estate or place descended to the heir with the inheritance; this kind of heirloom is now obsolete (o). A horn which had been originally delivered with and as the symbol of tenure by cornage has been held to pass to the heir, probably as an evidence of title (p). monuments of an ancestor in a church or churchyard, whether fixed or movable, are said to be heritable; and the heir may maintain an action for taking or defacing them (q).

Chattels settled as heirlooms.

"Heirlooms" in modern times are personal chattels which are annexed to settled land by limiting them for the same uses and estates, so as to pass with the land as far as the rules of law and equity permit. If the land is limited in strict settlement, that is, for successive estates for life with remainders in tail, chattels settled upon the same limitations accompany the land through the successive life estates; but as soon as the land vests in a tenant in tail in possession, the chattels, as there can be no estate tail in such property, vest in that tenant absolutely as part of his personal estate, and thus become disconnected with the land (r). In order to prolong as far as possible the annexation of the chattels to the land it is usual to

<sup>(</sup>m) Plant v. Cotterell, 5 H. & N. 430; 29 L. J. Ex. 198.
(n) Spackman v. Foster, L. R. 11 Q. B. D. 99; 52 L. J. Q. B. 418.
(o) Co. Lit. 18 b, 185 b; Wms. Exors. 606, 4th ed.

<sup>(</sup>p) Pusey v. Pusey, 1 Vern. 273.

<sup>(</sup>q) Co. Lit. 18 b; Frances v. Ley, Cro. Jac. 367; Spooner v. Brewster, 3 Bing. 136.

<sup>(</sup>r) Foley v. Burnell, 1 Bro. C. C. 274; Vaughan v. Burslem, 3 Bro. C. C. 101; Carr v. Lord Erroll, 14 Ves. 478.

insert in the settlement a proviso or condition that the chattels shall not vest absolutely in any tenant in tail unless he shall attain the age of twenty-one years; which is effectual until a tenant in tail on coming of age acquires absolute power of disposing of the land by means of barring the entail; beyond this point it is not possible to preserve the settlement of the land, nor can the disposal of the chattels be further restricted without infringing the rule against perpetuities (s). Chattels may be thus settled to pass as heirlooms by expressed terms of limitation, or by reference to the expressed limitations of the land, or simply by the expression that they shall be treated as "heirlooms" to pass with the settled land; with the additional provision, if required, restraining the absolute vesting until the age of twenty-one (t). The tenant for life upon taking possession may be required to sign an inventory of the heirlooms, but cannot be required to give security, unless there is some special risk in his possession of them (u).—Personal chattels may be settled in the same manner independently, and without annexation or reference to real estate (v). But a bequest of a silver cup "to S. and his heirs for an heirloom" was construed to be simply an absolute bequest to S.; so that S. dying in the lifetime of the testator, it lapsed (w).—Where a settlement has Sale of heirannexed heirlooms to real estate, the tenant for life has looms. no power to dispose of them separately from the estate, even for his own life; for his only interest is to have the possession as annexed to the estate. Hence in the case of a testator giving certain benefits to the tenant for life of a settled estate having heirlooms annexed, and by the same will bequeathing the heirlooms of that estate

& H. 40; 29 L. J. C. 249; Savile

<sup>(</sup>s) Christie v. Gosling, L. R. 1 H. L. 279; 35 L. J. C. 667; Har-rington v. Harrington, L. R. 5 H. L. 87; 40 L. J. C. 716; Exmouth v. Praed, L. R. 23 C. D. 158; 52 L. J. C. 420; Parkin v. Cresswell, L. R. 24 C. D. 102; 52 L. J. C. 798. (t) Lord Scarsdale v. Curzon, 1 J.

v. Scarborough, 1 Swanst. 537. (u) Temple v. Thring, 56 L. J. C. 76<sup>7</sup>. (v) Shelley v. Shelley, L. R. 6
 Eq. 540; 37 L. J. C. 357.
 (w) Re Whorwood, L. R. 34 C. D.

<sup>446; 56</sup> L. J. C. 340.

to another person, it was held that the tenant for life, in claiming the benefits under the will, was not bound, by the doctrine of election, to make any compensation for the heirlooms, which he could not assign to the legatee; and that he was entitled both to claim the benefits under the will and to retain the heirlooms in his own right under the settlement (x). The Court has no original jurisdiction to order a sale of heirlooms which are annexed to real estate in strict settlement; although a sale would be beneficial to all parties interested (y). But where charges are to be raised out of the settled estate the Court can authorise a sale of heirlooms in preference to selling the land (z).

Settled Land Act.

The Settled Land Act, 1882, 45 & 46 Vict. c. 38, s. 37, as to personal chattels settled as heirlooms provides that (1) "A tenant for life of the land may sell the chattels or any of them;" (2) "The money arising by the sale shall be capital money arising under this Act and shall be dealt with as other capital money arising under this Act, or may be invested in the purchase of other chattels which shall be settled and held upon the same trusts and shall devolve in the same manner as the chattels sold;" (3) "A sale or purchase of chattels under this section shall not be made without an order of the The Court will not authorise the sale of the Court." settled estate by the tenant for life under the Act without providing at the same time for the sale of the heirlooms (a). The money arising from the sale of the heirlooms under the above section may be applied in discharge of incumbrances upon the settled land, notwithstanding that the heirlooms, if remaining unsold, would vest absolutely in the tenant in tail in remainder upon attaining twenty-one (b).

<sup>(</sup>x) Re Chesham, L. R. 31 C. D. 466; 55 L. J. C. 401.

<sup>(</sup>y) D'Eyncourt v. Gregory, L. R. 3 C. D. 635; 45 L. J. C. 741. (z) Fane v. Fane, L. R. 2 C. D.

<sup>711; 46</sup> L. J. C. 174. (a) Re Brown's Will, L. R. 27 C. D. 179; 53 L. J. C. 921.

<sup>(</sup>b) Re Marlborough's Settlement, L. R. 32 C. D. 1; 55 L. J. C. 339.

# CHAPTER X.

# INLAND WATER.

#### SECTION 1.—STANDING WATER.

Property in standing water—riparian ownership.

Water percolating below the surface-right of draining off waterdraining water from streams-draining mines-subsidence from draining-pollution of percolating water.

Water artificially collected—liability for escape of water—escape by accident or superior force-water collected in houses.

Extraordinary floods.

Inland water is of two kinds, having different conditions in law: namely,—standing water or water not flowing in a defined course, including the water of surface lakes and ponds, and the water diffused and percolating in the soil below the surface;—and running water, including rivers and streams flowing in a defined course, whether above or below the surface. Water is also treated differently in law according as it is found in or upon the land in a natural condition; or collected there by artificial means. These various conditions of water are treated severally in this chapter.

Water standing upon the surface of land in lakes or Property in ponds is considered as part of the land, so that the property standing water. in the land prima facie carries with it the property in the water. Accordingly a conveyance of "land" presumptively passes the water standing upon it; but the term "water" is not alone sufficient to convey the land upon which the water stands, without a context or circumstances

Riparian ownership.

showing an intention to convey the land by that description (b).—If there is only one riparian owner, whose land surrounds a lake of water, the whole presumptively belongs to him as part of his land. If there are several riparian owners, they are presumptively entitled to those parts of the lake and of the bed of the lake which are opposite their respective banks, so far as the medium filum aquæ; and all beneficial uses, as the right to take materials from the bed of the lake, the rights of boating, fishing, and shooting, presumptively follow the limits thus ascertained. By the law of Scotland, a distinction is made as to those rights over the surface of the water which cannot be conveniently limited and enjoyed in severalty, such as the rights of boating, and fishing, and fowling; and all riparian owners are presumptively entitled to use and enjoy these rights in common, in the absence of title to the contrary (c).

Water percolating below surface.

Right of draining off water.

Water percolating below the surface of land is not a subject of absolute property until appropriated; but the owner of the land in which it is found for the time being may appropriate the percolating water to the extent that he may take it all so as to prevent any of it percolating into the land of his neighbour. "This percolating water below the surface is therefore a common reservoir or source in which nobody has any property, but of which everybody has, as far as he can, the right of appropriating the whole" (d).—The owner of the land may exercise his right of appropriating and removing the water percolating beneath the surface, although by so doing he drains off the water from the adjacent soil and lowers or exhausts the natural supply. Accordingly, where, in the course of mining operations carried on in the usual manner the water was pumped from the soil, and thereby all the water

<sup>(</sup>b) Co. Lit. 4 a, b; ante, p. 5. (c) Mackenzie v. Bankes, L. R. 3 Ap. Ca. 1324; as to ownership of bed of stream, see post, p. 153.

<sup>(</sup>d) Brett, M. R. Ballard v. Tomlinson, L. R. 29 C. D. 121; 54 L. J. C. 456.

was drained out of a well in the adjacent land, it was held that the owner of the well had no claim to compensation for the loss of water (e). The cases, it is said, affirm this proposition: "that the disturbance or removal of the soil in a man's own land, though it is the means, by process of natural percolation, of drying up his neighbour's spring or well, does not constitute the invasion of a legal right, and will not sustain an action; and further, that it makes no difference whether the damage arise by the water percolating away, so that it ceases to flow along channels through which it previously found its way to the spring or well, or whether, having found its way to the spring or well, it ceases to be retained there" (f).

So a person may lawfully drain off water in his own Draining land, which would otherwise have percolated into and water from streams. supplied a river or stream of water running in a defined course, although by so doing he materially diminishes the flow of water. Accordingly where a Local Board of Health sunk a well in their own ground and pumped up water for the supply of a town, thereby abstracting the water which would have percolated into a river; it was held that the mill owners on the river had no remedy for the loss of the water (g). But after the water has once percolated into a defined stream, there is no right to divert it by draining, or to abstract it for any purpose not justified by the legitimate use of a running stream; and the owner of adjacent land is not entitled to drain his land, either above or below the surface with the effect of drawing water from the stream (h). A spring or definite source of water that supplies a stream is considered as part of the

710; 32 L. J. Q. B. 105.

(g) Chasemore v. Richards, 7 H. L. C. 349; 29 L. J. Ex. 81; over-

<sup>(</sup>e) Acton v. Blundell, 12 M. & W. 324. (f) Per cur. Ballacorkish Mining

Co. v. Harrison, L. R. 5 P. C. 60; Rawstron v. Taylor, 11 Ex. 369; 25 L. J. Ex. 33; Broadbent v. Rams-bottom, 11 Ex. 602; 25 L. J. Ex. 115; New River Co. v. Johnson, 29 L. J. M. C. 93; The Queen v. Metrop. Board of Works, 3 B. & S.

ruling on this point, Dickinson v.
Grand Junction Canal, 7 Ex. 282.

(h) Dickinson v. Grand Junction
Canal, supra; Grand Junction Canal
v. Shugar, L. R. 6 Ch. 483; post, p. 149.

stream in this respect (i). "A stream of water in law is water which runs in a defined course, so as to be capable of diversion, and the term does not include the percolation of water below ground "(k).

Draining mines or subsoil.

The same principle applies between several owners of the surface and substratum; so that the owner of mines or subsoil is not in general responsible to the owner of the surface for draining off the surface water; nor is he liable to make compensation for the abstraction of percolating water which would otherwise have flowed into, or, having flowed into, would have been retained in the wells and springs of the superjacent land. Upon a grant or reservation of mines or of a right of mining, there is no implied exception of the water, in the absence of special agreement respecting it (1). But the water may be made the subject of express grant or agreement; thus where land was demised to a lessee "with all the streams of water that might be found," but excepting the mines and minerals, and the right of working them, it was held that the lessor was precluded from afterwards working the mines in a manner to affect the springs and sources of water that supplied the streams referred to in the demise, for that the rights of the parties were regulated exclusively by the terms of the deed(m). So in general if a grant of land be made for a special purpose that requires the permanent use of the water contained in the soil, the grantor cannot afterwards derogate from his own grant by draining off the water so as to render the land less fit for the purpose in question (n). Where land was conveyed for building purposes subject to a rent reserved, and to a covenant by the grantee to build sufficient houses to secure the rent; it

<sup>(</sup>i) Dudden v. Clutton Union, 1 H. & N. 630; 26 L. J. Ex. 146; French Hoek v. Hugo, L. R. 10

Ap. Ca. 336.
(k) Jessel, M. R. Taylor v. St.
Helens, L. R. 6 C. D. 273; 46
L. J. C. 861.

<sup>(1)</sup> Ballacorkish Mining Co. v. Harrison, L. R. 5 P. C. 49; 43 L. J. P. C. 19.

<sup>(</sup>n) Whitchead v. Parkes, 2 H. & N. 870; 27 L. J. Ex. 169. (n) Popplewell v. Hodkinson, L. R. 4 Ex. 248; 38 L. J. Ex. 126.

was held that there was no implied obligation on the grantor not to drain the adjacent land which he had retained also for building, the land not being suitable for building without draining; and that the grantee had no remedy against him for so doing, although his own land was thereby drained, and his buildings sank and were damaged (o).—Upon the same principle the owner of land Subsidence of is not responsible, if, by draining his own land in the ordidraining. nary and proper course of cultivation or mining, he causes a subsidence in the adjacent land. "Although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil if for any reason it becomes necessary or convenient for him to do so "(p).

The owner of land may pollute the water percolating in Pollution of his own soil, by discharging sewage or other noxious matter percolating into it (subject to public sanitary regulations), provided he keeps such pollution within his own boundaries, and does not suffer it to percolate into the adjacent land to the nuisance of the owner. Where the owner of land discharged sewage into a well upon his property, and the adjacent owner by drawing water from a well upon his own land caused the polluted water to flow into his well; it was held that the former was responsible for the pollution, because it was caused by the natural percolation of the water (q).

The collection of water upon land in an artificial manner Water artiis attended with special obligations towards the owners of ficially collected. adjacent lands. Where a person constructed a reservoir for storing water for the use of a mill, and the water escaped through some unknown channels into his neigh-

<sup>(</sup>o) Popplewell v. Hodkinson, supra. (p) Per cur., Popplevell v. Hod-kinson, L. R. 4 Ex. 248; 38 L. J. Ex. 126; Elliot v. North Eastern

Ry. Co., 10 H. L. C. 333; 32 L. J.

<sup>(</sup>q) Ballard v. Tomlinson, L. R. 29 C. D. 115; 54 L. J. C. 454.

Liability for escape of water.

bour's mine, he was held responsible for the damage done by it; upon the general principle, "that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape "(r). So it is laid down that, "if any one by artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's lands, and thus substantially to interfere with his enjoyment, he will be liable to an action (s)." Upon this principle the occupier of land was held liable for the damage caused by an artificial mound of earth raised against the adjoining wall, the dampness from which soaked through the wall into the adjoining house; and he was restrained by injunction from continuing the nuisance (t). So in mining, if the owner in course of working collects or diverts water, in greater quantity or in a different manner than would occur in the natural process of percolation through the soil, and discharges or allows it to discharge into a lower mine, he is responsible for the consequences (u). But if in the usual and proper mode of working a mine and removal of the minerals, the water by the mere process of natural percolation discharges itself into the lower mine, the owner of the latter has no cause of complaint (v). And in general a person may collect and use the water in his own land, without incurring any liability, provided in fact it ultimately reaches the adjacent land in the same way, and in no greater quantity

<sup>(</sup>r) Rylands v. Fletcher, L. R. 3 H. L. 330; 37 L. J. Ex. 161; Evans v. Manchester, &c. Ry., 57 L. J. C. 153; Snow v. Whitehead, L. R. 27 C. D. 588; 53 L. J. C. 885

<sup>(</sup>s) Per cur. Hurdman v. North Eastern Ry., L. R. 3 C. P. D. 173; 47 L. J. C. P. 368.

<sup>(</sup>t) Broder v. Saillard, L. R. 2 C. D. 692; 45 L. J. C. 414; Hurd-

man v. North Eastern Ry., supra.
(u) Baird v. Williamson, 15 C.B.
N. S. 376; 33 L. J. C. P. 101;
Fletcher v. Smith, L. R. 2 Ap. Ca.
781; S. C. nom. Smith v. Musgrave,
47 L. J. Ex. 4; Crompton v. Lea,
L. R. 19 Eq. 115; 44 L. J. C. 69.
(v) Smith v. Kenrick, 7 C. B.
564; Wilson v. Waddell, L. R. 2
Ap. Ca. 95.

than before. "The merely obtaining a temporary control over the water does not impose on the owner of the land the obligation of keeping it, nor prevent him from restoring it to the strata from whence it came, unless he makes it flow differently "(w).

If water collected upon land be discharged over the Escape by adjacent land by some accident or superior agency over accident or superior which the owner has no control, he would not be liable for force. the consequences; as was held in the case of a reservoir of water being destroyed and washed away by an extraordinary storm of rain, which could not reasonably have been anticipated, although if it had been anticipated, the effect might have been prevented; for an extraordinary storm like an earthquake, might be called an act of God or vis major, meaning thereby some event that it was practically impossible to anticipate or to resist. ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity" (x). Where a dock company were empowered to cut through the bank of a tidal river for the purpose of drawing the water through an artificial channel, it was held that they were bound to keep the retaining wall of their works at the regulation height of the river bank; and that they were liable for the damage caused by an overflow of water through the defective height of their wall; but that they were not chargeable with the excess of damage due to an extraordinary tide which rose above the regulation height (y). And where a reservoir was overflowed by the irruption of water from the emptying of an adjoining reservoir, the owner

<sup>(</sup>w) Brett, L. J. West Cumberland Iron Co. v. Kenyon, L. R. 11 C. D. 788; 48 L. J. C. 793.

<sup>(</sup>x) Per cur. Nichols v. Marsland,

L. R. 2 Ex. D. 1; 46 L. J. Ex. 187. (y) Nitro-Phosphate Co. v. London and St. K. Docks Co., L. R. 9 C. D. 503.

was held not to be liable for the damage; for that it was caused by the act of a stranger, which he could not anticipate or control (z).—So if the act done is ordered or authorized by Act of Parliament and done properly and without negligence, there is no liability for damage caused by it, except as may be provided for in the Act (a).

Water collected in houses.

Where several tenants occupy parts of the same house in which water is collected or laid on for the benefit of all, they are presumed, as between themselves, to share in common all risk of escape of the water arising from the construction or failure of the cistern or pipes. There is no mutual obligation beyond that of taking reasonable care in the use of the water; nor any liability to one another except for negligence (b). Nor has the landlord any greater liability to the tenants, in respect of the water collected in the house for the benefit of all, unless he has contracted with them for its safety; and an escape of water by the bursting of a pipe was held not to be a breach of the covenant of the landlord for quiet enjoyment (c).—Where the water from the roof of a house was collected in a cistern upon an upper storey, and the water escaped through a hole in the cistern made by a rat, and damaged the goods upon the ground floor; it was held that the owner of the house, who had let off the ground floor, retaining the upper part of the house in his own occupation, was not liable for the damage done; for that "the accident was due to vis major as much as if a flash of lightning or a hurricane had caused the rent" (d).

Extraordinary floods.

In the case of an extraordinary flood of water, every man has the right of defending his own property, although

(z) Box v. Jubb, L. R. 4 Ex. D. 76; 48 L. J. Ex. 417.
(a) Dixon v. Metrop. Board, L. R. 7 Q. B. D. 418; 50 L. J. Q. B. 772; Erans v. Manchester, &c. Ry. 57 L. J. C. 153.

(b) Carstairs v. Taylor, L. R. 6 Ex. 217; 40 L. J. Ex. 129; Ross v. Fedden, L. R. 7 Q. B. 661; 41

L. J. Q. B. 270; see Stevens v. Woodward, L. R. 6 Q. B. D. 318; 50 L. J. Q. B. 231.

(c) Anderson v. Oppenheimer, 49 L. J. Q. B. 708; L. R. 5 Q. B. D.

(d) Carstairs v. Taylor, L. R. 6 Ex. 217; 40 L. J. Ex. 129.

in doing so he turns the water on to the property of another. Accordingly, the proprietors of a canal were held to be justified in excluding flood water, not produced by any feeder of their own canal, which consequently flowed over the adjacent land of others. And it seems that even in the case of a natural watercourse the riparian proprietor is entitled to protect himself by keeping off extraordinary floods (e). Floods of ordinary recurrence cannot be diverted from their usual and ordinary course to the injury of others. "At common law landholders would have the right to raise the banks of a river or brook from time to time, as it became necessary, upon their own lands, so as to confine the flood water within the banks and to prevent it from overflowing their own lands; with this restriction, that they did not thereby occasion any injury to the lands or property of other persons" (f). After flood water has finally settled upon land, and no longer threatens a common danger, the owner of that land must bear the loss and has no further right to discharge the water upon the land of others. Where a flood brought down water which lodged against the embankment of a railway and threatened to destroy it, it was held that the company were not entitled to protect the embankment by cutting trenches through it and letting off the water on to the adjacent land (q).

<sup>(</sup>e) Nield v. London & N. W. Ry., L. R. 10 Ex. 4; 44 L. J. Ex. 15. (f) Per cur. Trafford v. The King, 8 Bing. 211. (g) Whalley v. Lancashire Ry. Co., L. R. 13 Q. B. D. 131; 53 L. J. Q. B. 285.

### CHAPTER X.—continued.

# Section 2.—Running Water.

Property in natural streams—remedies of riparian owner—streams below the surface.

Rights of ordinary use by riparian owners—diverting water for extraordinary use.

Rights acquired in excess of riparian rights—rights acquired by nonriparian owners.

Property in bed of stream—change of bed—encroachment on bed.

Public navigable river—riparian rights upon navigable river—obstructions to navigation—change of course—private navigable river—towing path.

Property in natural streams.

Water running in a natural stream is not a subject of absolute property. A riparian land owner is entitled on the one hand to have the water flow, but he is obliged on the other hand to receive it and to let it flow, in its natural state; as expressed in the maxim "aqua currit et debet currere ut currere solebat"; and he has only a limited right to use the water as it flows (a). The rights of the riparian owner in the stream are a natural incident of his property in the land; and they pass by a conveyance of the land without express mention. Where the owner of land containing a spring and stream of water sold and conveyed the lower part of the land through which the stream flowed, it was held that the purchaser acquired the right to the flow of the stream and the vendor retained no right to divert it at the source, although there was no mention of the water in the deed of conveyance (b).

<sup>(</sup>a) Per cur. Wood v. Waud, 3 Ex. 775; Embrey v. Owen, 6 Ex. 353; Dickinson v. Grand Junction Canal, 7 Ex. 299; Medway Nav. Co. v.

Ronney, 9 C. B. N. S. 575.
(b) Canham v. Fisk, 2 C. & J. 126.

—Accordingly it is held that where a natural stream is diverted or taken for some public undertaking under the compulsory powers of the Lands Clauses Act, 1845, the claim for compensation to be made under the Act is not for land or property taken, but for "injuriously affecting" land by depriving it of the use of the stream (c).

A riparian owner can maintain an action for any Remedies of sensible interference with the stream in its natural course, riparian owner. which prevents the flow to his land, or diminishes the quantity, or obstructs the discharge; unless it can be justified as a legitimate use of the water by another riparian owner. In such action he is entitled to, at least, nominal damages, and he can recover full damages for loss actually sustained by being deprived of the use that he in fact makes of the water for any lawful purpose (d). He may further claim an injunction to restrain such interference in the future, although the damage hitherto has been only nominal (e).

Water running in a natural stream below the surface of Streams the land is subject to the same rules of law as water surface. running on the surface, so far as the different circumstances permit. "The owner of the soil under which the stream flowed could maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground" (f).

A riparian owner has the right of taking and consuming Rights of water from a natural stream for the ordinary use of his ordinary use.

<sup>(</sup>c) 8 & 9 Vict. c. 18, s. 68; Bush v. Trowbridge Waterworks Co., L. R. 10 Ch. 459; 44 L. J. C. 235; Stone v. Yeovil, L. R. 1 C. P. D. 691; 45 L. J. C. P. 657.

<sup>(</sup>d) Per cur. Ormerod v. Todmorden Mill Co., L. R. 11 Q. B. D. 159; 52 L. J. Q. B. 445; Kensit v. Great Eastern Ry., L. R. 27 C. D. 130; 54 L. J. C. 22.

<sup>(</sup>e) Mellish, L. J., Clowes v. Staffordshire Potteries Co., L. R. 8 Ch. 142; 42 L. J. C. 107; Pennington v. Prinsop Hall Coal Co., L. R. 5 C. D. 769; 46 L. J. C. 773.

<sup>(</sup>f) Per cur. Dickinson v. Grand Junction Canal, 7 Ex. 301; Parke, B., Broadbent v. Ramsbotham, 11 Ex. 602; 25 L. J. Ex. 121.

tenement; he may take the water for domestic use, as for drinking, washing, and the like purposes; also he may take water for watering cattle. The extent of his right is limited in general by what is reasonable under the circumstances, regard being had to the similar rights of all other riparian owners. A riparian owner is entitled to take and consume sufficient water for ordinary domestic purposes, of washing and drinking, whatever quantity of water may be thereby exhausted (g). A railway company, as riparian owners, may take the water in reasonable quantities for supplying locomotive engines and other requirements of a railway station; leaving sufficient for all other uses of the stream (h). But a railway company was restrained from taking the water of a river for the use of a large station in quantities which in the judgment of the conservators of the river impeded the navigation (i).—A riparian owner is not entitled to take water for purposes not connected with his own land; as in the case of a waterworks company taking the water of a stream for the supply of a neighbouring town (k), or riparian owners taking water for the supply of a county lunatic asylum (1).

Diverting water for extraordinary use.

A riparian owner may divert the water of a stream for extraordinary uses, provided he returns it to the natural stream before it leaves his land, not materially diminished in quantity, or affected in quality, or delayed in delivery, to the sensible injury of the other riparian owners. may thus divert and use the water for irrigating the land, or for working a mill or factory (m). Nor does the diver-

<sup>(</sup>g) Cairns, L. C., Swindon Waterworks v. Wilts Canal, L. R. 7 H. L. 704. See Roberts v. Richards, 50 L. J. C. 297; Norbury v. Kitchin, 9 Jur. N. S. 132; 3 Fost. & F. 292. (h) Sandwich v. Great N. Ry. Co.,L. R. 10 C. D. 707; 49 L. J. C. 225.

<sup>(</sup>i) Att.-Gen. v. Great Eastern Ry., L. R. 6 Ch. 572. (k) Swindon Waterworks Co. v. Wilts & Berks Canal, L. R. 7 H. L. 697; 45 L. J. C. 638.

<sup>(</sup>l) Medway Co. v. Romney, 9 C. B.

<sup>(</sup>m) Embrey v. Owen, 6 Ex. 353; Sampson v. Hoddinott, 1 C. B. N. S. 590; 26 L. J. C. P. 148; Kensit v. Great Eastern Ry., L. R. 27 C. D. 122; 54 L. J. C. 19; L. Blackburn, Orr-Ewing v. Colquhoun, L. R. 2 Ap. Ca. 856; Cairns, L. C., Swindon Waterworks Co. v. Wilts & Berks Canal, L. R. 7 H. L. 704.

sion and use of the water on his own land disentitle him from discharging it as before, provided he does not alter the mode of discharge, or increase the obligation of the other riparian owners in receiving it (n).—The rights of a riparian owner are summarily stated as follows: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of water flowing past his land; for instance, to the reasonable use of water for domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to intercept the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury" (o).

A riparian owner may acquire rights in excess of his Rights acnatural riparian rights, by grant or prescription. He may quired in excess of thus acquire the right to divert the stream wholly or in natural part from some or all of the lower riparian owners, and appropriate the water to his own use. "The general rule of law is that every man has a right to have the flow of water in his own land without diminution or alteration. But an adverse right may exist founded on the occupation of another. And though the stream be either diminished in quantity or even corrupted in quality, yet if the occu-

by the Court in Nuttall v. Bracewell, L. R. 2 Ex. 1; 36 L. J. Ex. 4; and in Sandwich v. Great Northern Ry., L. R. 10 C. D. 712; 49 L. J. C.

<sup>(</sup>n) West Cumberland Steel Co. v. Kenyon, L. R. 11 C. D. 782; 48 L. J. C. 793; Frechette v. St. Hyacinthe Co., L. R. 9 Ap. Ca. 170 (o) L. Kingsdown, Miner v. Gilmour, 12 Moore P. C. 156, adopted

pation of the party so taking or using it have existed for so long time as may raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right "(p). But such occupation and use of the water in excess of riparian rights has no operation against other riparian owners, unless it obstructs or interferes with the actual exercise of their rights in a manner to raise a presumption of a grant; for the other riparian owners, though they may grant away or release their rights, do not lose them by mere non-exercise, and they may abstain or begin to exercise them whenever they please (q). A riparian owner who thus acquired the right of diverting the stream adversely to other riparian owners becomes absolute owner of the water pro tanto and may appropriate it to any new use; and in an action for obstructing the natural stream he may claim damages in respect of the extended use of the water, "for it is the necessary effect of every appropriation of running water to a new and more beneficial use that a wrongful diversion or abstraction entails a larger measure of liability "(r).

Rights acquired by non-riparian owner.

The rights of a riparian owner as such, are so inseparately incident to the possession of the land that they cannot be granted to a non-riparian owner separately from the land, so as to give the grantee any rights of taking water as against other riparian owners; such a grant would be valid only against the grantor himself (s). But where a riparian owner has diverted the stream through an artificial watercourse for working a mill or other extraordinary use (which he is entitled to do subject to the rights of other riparian owners as to the return of the water,) he may grant and convey the mill and watercourse to another, who will thereby acquire a position similar to that of a

<sup>(</sup>p) Ellenborough, C. J. Bealey v. Shaw, 6 East, 214; Leach, V.-C., Wright v. Howard, 1 S. & S. 190. (q) Sampson v. Hoddinott, 1 C. B. N. S. 611; Roberts v. Richards, 50 L. J. C. 297.

<sup>(</sup>r) Holker v. Porritt, L. R. 10 Ex. 59; 44 L. J. Ex. 52.

<sup>(</sup>s) Stockport Waterworks v. Potter, 3 H. & C. 300; Ormerod v. Todmorden Mill Co., L. R. 11 Q. B. D. 155; 52 L. J. Q. B. 445.

riparian owner with the same rights (t). And a nonriparian owner who can obtain access to the stream by means of a pipe or watercourse through riparian land may draw water from the stream and use it, provided that he returns it to the stream in the same place, quantity and condition so as not sensibly to interfere with the rights of any of the riparian owners; though he may have none of the rights of a riparian owner entitling him as against them to complain of an interference with the stream (u).

The property in the bed of an inland river or natural Property in stream presumptively belongs to the owner of the banks through which it flows. Where the property in the opposite banks is in different persons, each of them is presumptively the separate owner of the bed of the stream on his side, usque ad medium filum aquæ (v). This presumption of ownership may be displaced by evidence of exclusive ownership of the whole bed of the river in the owner of one of the banks; and acts of ownership in other parts of the bed of the river similarly situated, of such a kind as to raise a reasonable inference of one ownership of the whole, are admissible evidence (u). In a case where the land in question was originally manorial land, and the fishery of the river had from time immemorial been let to tenants as a separate tenement distinct from the riparian land, the tenants of which had never exercised any right of fishing or other proprietary rights in the river, it was held that the presumption of ownership of the bed of the river in the riparian grantees was rebutted (x). A like presumption applies in the construction of conveyances.

bed of stream

<sup>(</sup>t) Nuttall v. Bracewell, L. R. 2 Ex. 1; 36 L. J. Ex. 1; Swindon Waterworks Co. v. Wilts and Berks Canal, L. R. 7 H. L. 697; 45 L. J.

<sup>(</sup>u) Kensit v. Great Eastern Ry., L. R. 27 C. D. 122; 54 L. J. C. 19; Ormerod v. Todmorden Mill Co., L. R. 11 Q. B. D. 155; 52 L. J.

Q. B. 445.

<sup>(</sup>v) Hale, De Jur. Maris, Hargr. Tracts, pp. 5, 12; Bickett v. Morris, L. R. 1 Sc. Ap. 47. (w) Jones v. Williams, 2 M. & W.

<sup>(</sup>x) Devonshire v. Pattinson, L. R. 20 Q. B. D. 263; 57 L. J. Q. B. 189.

Where the land conveyed is described as bounded by a river, the presumptive construction is that the bed of the river to the middle line passes with the land; and this presumption prevails although the land is described by reference to a map in which it is marked or coloured exclusively of the river, and although it is further described by measurement excluding the river. The presumption may be rebutted by circumstances showing a contrary intention at the time of the conveyance, but not by subsequent circumstances (y). It is said that the riparian rights in a stream are not a mere incident of the property in the bed, but attach also to a riparian owner who has no property in the bed of the stream; and that "the water may be lawfully appropriated by every one having a right of access to it. It is of course necessary for the existence of a riparian right that the land should be in contact with the flow of the stream, but lateral contact is as good, jure naturæ, as vertical"(s). But the right to take water from a stream flowing over a bed which is exclusively the property of another seems rather to be an acquired easement than a natural incident of the property in the bank (a).

Change of bed.

If the banks of an inland stream change by imperceptible detrition or accretion the property in the bed and the rights of riparian owners change with the course of the stream; but if the change be made perceptibly then the ownership of the soil remains according to the former bounds (b). Accordingly the right of fishing which is presumptively incident to riparian property ad medium filum aquæ shifts with the medium filum upon a gradual accretion to one of the banks (c); and an exclusive right of fishery over the whole bed of a river shifts in the same way (d). "The law is based upon the impossibility of identifying

<sup>(</sup>y) Micklethwait v. Newlay Bridge Co., L. R. 33 C. D. 133.

<sup>(</sup>z) L. Selborne, Lyon v. Fish-mongers' Co., L. R. 1 Ap. Ca. 683.

<sup>(</sup>a) See post, p. 226.

<sup>(</sup>b) Hale, De J. Maris, Hargr. Tracts, p. 5.

<sup>(</sup>c) Zetland v. Glover Incorp. Perth,

L. R. 2 Sc. Ap. 70. (d) Foster v. Wright, L. R. 4 C. P. D. 438; 49 L. J. C. P. 97.

from day to day small additions to or subtractions from land caused by the constant action of running water." Hence the title to land so gradually and imperceptibly acquired is not defeated merely by proof of the ancient boundaries (e). Where a river had receded from the ancient bank and left some pieces of dry land, which the owner of the opposite bank and river bed claimed as against the owner of the adjacent land; and upon which he had continually exercised exclusive acts of ownership; it was held that the direct evidence of ownership precluded any presumption arising from the mode of accretion, whether gradual or sudden, and that the process of change was therefore immaterial (f).—If a stream changes its course not by gradual alteration of the bed, but by abandoning the old bed and flowing in another direction, the private rights of riparian owners and others in the original stream are lost; and they acquire no similar rights in the new course of the water (g).

The owner of the bed of a stream is not entitled to use Encroachit for any purpose that will interfere with the natural ment on bed. course of the stream injuriously to the riparian owners. Any building or work extending into the stream is primâ facie an encroachment upon their right, and is a cause of action in respect of the possible consequences upon the course of the stream, without the necessity of proving any damage in fact caused by it, or any particular probable damage: the onus being laid upon the person making it of showing that it is not in fact an encroachment and that it cannot have any perceptible effect upon the stream (h).—A riparian owner may build a wharf or bulwark for protection of his own bank provided he does not encroach upon the bed of the stream or alter the direction of the current injuriously to others (i). And it is said:

<sup>(</sup>e) Foster v. Wright, supra. (f) Ford v. Lacey, 7 H. & N. 151; 30 L. J. Ex. 351. (g) Carlisle v. Graham, L. R. 4 Ex. 361; 38 L. J. Ex. 226.
(h) Bickett v. Morris, L. R. 1

Sc. Ap. 47; L. Blackburn, Orr-Ewing v. Colguhoun, L. R. 2 Ap. Ca. 853; Att.-Gen. v. Lonsdale, L. R. 7 Eq. 377; 38 L. J. C. 335, post, p. 156. (i) Chelmsford, L. C., Bickett v.

"that scouring and cleansing of a river bed, so as to keep the stream in its accustomed course and at its accustomed level, is not only permissible in but obligatory upon a riparian owner;" but "that a substantial interference with the bed of a stream, so as to increase or diminish the flow of water to the detriment of other riparian owners, is actionable in itself "(k).

Public navigable rivers.

A public right of navigation upon inland rivers and streams is analogous to the right of highways upon land. It is established, in general, by public use, which also defines the limits and nature and extent of the navigation (1). The right of navigation on a lake is subject to the like principles (m). Tidal rivers are primâ facie public for the purpose of navigation by common law (n).

Riparian rights in navigable rivers.

Where the public have rights of navigation, the rights of owners of the soil and of riparian owners are subordinate to the rights of the public, as well as to those of the other riparian owners as above stated. The owner of the bed of the river cannot make any building or erection in any part of the bed of the river, to the obstruction of navigation (o). A riparian owner on a navigable river cannot in exercise of riparian rights appropriate water to an extent prejudicial to the navigation (p). A riparian owner upon a navigable river has the right of access to his own land, and of mooring vessels in the river adjoining his land, and keeping them there a reasonable time for the purpose of loading and unloading (q). But he has not the further right in aid of access to his land and of landing

Morris, L. R. 1 Sc. Ap. 56; Att.-Gen. v. Lonsdale, supra; Duke of Sutherland v. Ross, L. R. 3 Ap. Ca.

(k) Per cur. Rhodes v. Airedale Commiss., L. R. 1 C. P. D. 392; 45 L. J. C. P. 341.

(l) Hale, De J. Maris, c. 3; Orr-Ewing v. Colquhoun, L. R. 2 Ap. Ca. 839; Bell v. Quebec, L. R. 5 Ap. Ca. 93; 49 L. J. P. C. 1. (m) Marshall v. Ulleswater Nav.

Co., L. R. 7 Q. B. 167; 41 L. J. Q. B. 41.

(n) Post, p. 162.

(o) Att.-Gen. v. Lonsdale, L. R. 7 Eq. 377; 38 L. J. C. 335; Orr-Ewing v. Colquhoun, L. R. 2 Ap. Ca. 839; Att.-Gen. v. Terry, L. R. 9 Ch. 423.

(p) Att.-Gen. v. Great Eastern Ry., L. R. 6 Ch. 572.

(q) Marshall v. Ulleswater Nav. Co., L. R. 7 Q. B. 166; 41 L. J.

goods, to erect a wharf upon the bed of the river, or anything obstructive of the navigation; and a wharf set forward three feet in the bed of a navigable river sixty feet broad was held to be an obstruction that must be removed (r). This right of access to riparian land, and of mooring vessels for the use of the land gives a special value to land upon a navigable river, independently of the public right of navigation; by loss of which the land may be "injuriously affected," and the owner entitled to compensation under the Lands Clauses Act, in the event of the navigation being compulsorily obstructed under statutory powers (s).

An obstruction to navigation, like an obstruction on a Obstruction highway, as being a nuisance, may be removed by any to navigation. person actually obstructed in the use of the navigation; it is also ground for an indictment on the part of the public; a private individual cannot maintain an action to recover compensation for the inconvenience caused to him merely as one of the public, but he may maintain an action for the recovery of special damage caused either to his person or his property (t).

If a public navigable river changes its course by reced- Change in ing from one channel and flowing through another, the public right of navigation continues over the new course; but subject to antecedent private rights in the new course which may be obstructive to the navigation (n). Thus a fishing weir legally existing in a navigable river does not become removable as a nuisance to the navigation by reason of the ancient navigable channel becoming choked up and impassable (v). Private rights incident to the river in

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Q. B. 41; Original Hartlepool Coll.
v. Gibb, L. R. 5 C. D. 713; 46
L. J. C. 311; see post, p. 497.
(r) Att.-Gen. v. Terry, L. R. 9
Ch. 423; Marshall v. Ulleswater
Nav. Co., supra.
(s) Lyon v. Fishmonger's Co., L. R. 1 Ap. Ca. 662; 44 L. J. C. 747;
Metrop. Board v. McCarthy, L. R. 7 H. L. 243; 43 L. J. C. P. 385; Bell v. Quebec, L. R. 5 Ap. Ca. 84;
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<sup>49</sup> L. J. P. C. 1; A.-G. Straits Settlements v. Wemys, L. R. 13 Ap. Ca. 192; 57 L. J. P. C. 62. (t) Hale, D. J. Maris, c. 3; per cur. Colchester v. Brooke, 7 Q. B. 377; Bell v. Quebee, supra. (u) Per cur. Carlisle v. Graham, L. R. 4 Ex. 361; 38 L. J. Ex. (v) Williams v. Wilcox, 8 A. & E. 314.

the old channel, as a right of fishery, do not pass to the river in the new channel; but upon a gradual and insensible change in the course of a river, all rights public and private pass with it (w).

Private navigable river.

An inland river may be navigable, without being public. "If any person at his own charge makes his own private stream to be passable for boats or barges, either by making of locks or cuts, or drawing together other streams, yet this seems not to make it juris publici, and he may apply it to his own private use. For it is not hereby made to be juris publici unless it were done at a common charge, or by a public authority, or that by long continuance of time it hath been freely devoted to a public use. So likewise if he purchaseth the King's charter to take a reasonable toll for the passage of the King's subjects and puts it in use, these seem to be devoting it to the common use "(x).

Towing paths.

The public right of navigation does not, necessarily or presumptively, include the right to use the banks of the river for towing. But a towing path may be established by custom or by grant, or, as frequently happens, by act of parliament passed for the regulation of the navigation. A towing path is a public easement or highway, restricted to the purpose of towing and navigating vessels on the river, and independent of the property in the soil (y). An authority which provides and maintains the towing path of a navigable river, and takes toll for its use is presumptively bound to repair it, and is responsible for damage caused by the want of repair. a river conservancy board were held responsible for the loss of horses that fell into the river while towing a barge, through the bank giving way (z).

<sup>(</sup>w) Ante, p. 154. (x) Hale, De J. Maris, Hargr. Tracts, p. 9. See post, p. 162. (y) Ball v. Herbert, 3 T. R. 253; Bayley, J., The King v. Severn Ry., 2 B. & Ald. 648; Badger v. South

Yorkshire Ry., 1 E. & E. 347; 28 L. J. Q. B. 118; Lee Conservancy v. Button, L. R. 6 Ap. Ca. 685; 51 L. J. C. 17, post, p. 485. (z) Winch v. Thames Conservancy, L. R. 9 C. P. 378; 43 L. J. C. P. 167.

## CHAPTER XI.

# SEA AND TIDAL WATERS, SEA SHORE.

The sovereignty of the sea-Admiralty jurisdiction-The Territorial Waters Act-civil jurisdiction of the Admiralty.

Arm of sea-tidal rivers-right of navigation.

Property of Crown in sea shore—grants of sea shore—limits of sea shore -jurisdiction over sea shore-public rights over sea shore.

Prerogative rights and duties-protection of sea shores-commissioners of sewers-sea walls.

Ports-prerogative of Crown-statutory authority-port dues.

Wreck of the sea-prerogative of Crown-franchise of wreck-Receivers of Wreck.

A claim of sovereignty was formerly made on behalf of Sovereignty of the Crown of England over all the narrow seas, that is, the channels of sea surrounding the British Isles; but it is now generally admitted that the open sea beyond low water mark is not within the realm, except for certain purposes of statutory regulation; therefore it is not within the jurisdiction of the common law, and is not the subject of property in the Crown or in a subject (a).

The Admiralty Court in early times exercised juris- Jurisdiction diction over subjects of the realm in respect of offences of Admiralty. committed upon the high seas, beyond the territorial jurisdiction of the common law. The boundary between the jurisdiction of the common law upon land and the Admiralty Court upon the high seas was the line of water according to the state of the tide, the sea shore between

<sup>(</sup>a) Hale, De J. Maris, c. 4, citing Selden's Mare Clausum; The Queen v. Keyn, L. R. 2 Ex. D. 175; 46 L. J. M. C. 17; Harris v. Fran-

conia, L. R. 2 C. P. D. 173; 46 L. J. C. P. 363; Blackpool Pier Co. v. Fylde Union, 46 L. J. M. C. 189.

high and low water marks being alternately within each jurisdiction (b). The Admiralty Court proceeded according to the civil law; but by various statutes passed from time to time offences committed upon the high seas within the Admiralty jurisdiction were tried and determined according to the course of the common law as if they had been committed upon land. By 4 & 5 Will. IV. c. 36, s. 22, all such offences were made triable at the Central Criminal Court created by that statute; and by 7 & 8 Vict. c. 2, s. 1, they may now be tried at assizes. Admiralty jurisdiction over offences upon the high seas applies to British subjects, and to foreigners being on board British ships; and it applies to British ships in a foreign port or estuary or tidal river. But it has no application to foreigners in foreign ships, even for offences against the person or property of British subjects beyond the limits of British territorial jurisdiction (c).—The territorial limit of jurisdiction over foreigners on foreign ships is now regulated by "The Territorial Waters Jurisdiction Act, 1878," 41 & 42 Vict. c. 73. After reciting that "whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions;" " and whereas all offences committed on the open sea within a certain distance of the coasts, by whomsoever committed should be dealt with according to law;" it enacts, sect. 2, that "an offence committed by a person, whether he is, or is not, a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a

Territorial Waters Jurisdiction Act.

<sup>(</sup>b) 3 Co. Inst. 113; Constable's Case, 5 Co. 107b; Cockburn, C. J., Queen v. Keyn, L. R. 2 Ex. D. 168; Ex. D. 63; 46 L. J. M. 17; The Queen v. Carr, L. R. 10 Q. B. D. 76; 52 L. J. M. 12. 2 C. P. D. 173.

foreign ship." The Act proceeds to regulate the trial of the offender; and by the interpretation clause, sect. 7, enacts that "for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the . coast measured from low water mark shall be deemed to be within the territorial waters of Her Majesty's dominions."

The Court of Admiralty has also civil jurisdiction, which Civil jurisdicis exercised in rem by seizing and detaining a ship until miralty. security is given to abide the event of proceedings, in all causes of maritime injuries caused by such ship upon the sea and out of the jurisdiction of the common law. The original jurisdiction of the Admiralty has been largely extended by statutes, so as to include, speaking generally, all causes relating to shipping and maritime affairs; such as wages of seamen, necessaries, possession, damage, salvage, prize of war, and other like matters. And by the Admiralty Court Act, 1861, s. 35, the jurisdiction may be exercised either by proceedings in rem or by proceedings in personam (d).

An arm of the sea is treated in law as part of the terri- Arm of sea. tory which encloses it. An arm of the sea, it is said, "lies within the fauces terræ, where a man may reasonably dis-

cern between shore and shore" (e). The property in an arm of the sea is presumptively in the Crown; but it may be in a subject either by title of a Crown grant, or by prescription which implies an original grant and is proved by evidence of long possession and acts of ownership (f).

Tidal rivers are treated in law as arms of the sea as Tidal rivers.

<sup>(</sup>d) 3 & 4 Vict. c. 65; Admiralty Court Act, 1861, 24 Vict. c. 10; The County Courts Admiralty Ju-risdiction Act, 31 & 32 Vict. c. 71; The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 527.

<sup>(</sup>e) Hale, De J. Maris, c. iv. See as to the Bristol Channel,

The Queen v. Cunningham, 28 L. J. M. 66; Conception Bay in New-foundland, Direct U. S. Cable Co. v. Anglo-American Tel. Co., L. R. 2 Ap. Ca. 394; the River and Gulf of St. Lawrence, Birrell v. Dryer, L. R. 9 Ap. Ca. 347.

<sup>(</sup>f) Hale, De J. Maris, c. iv, v.

regards the property in them, which is presumptively in the Crown as far as the tide flows; though it may be in a subject by grant from the Crown(g). There is no analogous presumptive title in the Crown to non-tidal and inland waters, however large (h). A non-tidal river and a river above the flow of the tide is primâ facie the private property of the riparian owners, as regards the bed of the river and such rights as may be had in the water (i). A "tidal river" extends as far as the water actually flows and reflows regularly, and not where the water merely rises and falls by reason of being dammed back by the tide; nor where the water flows on occasion of an unusual high tide or other exceptional circumstances (j). "The river Thames above Kingston and the Severn above Tewkesbury though there they are public rivers, (i. e. for navigation) yet are not arms of the sea. But although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow, as in the Thames above the bridge" (k). Havens, rivers, creeks and other places where the tide flows are included within the body of the adjoining county, and therefore within the jurisdiction of the sheriff and coroner and other officers of the common law (l).

Right of navigation.

Tidal rivers are prima facie public for the purposes of navigation (m). Non-tidal rivers, though primâ facie private property, may be subject to a public right of navigation (n). The right of navigation in a tidal river includes "all such rights upon the water as, with relation to the circum-

<sup>(</sup>g) Hale, De J. Maris, c. iv; per cur. Williams v. Wilcox, 8 A. & E. 333; Gann v. Whitstable, 11 H. L. C. 192; 35 L. J. C. P. 29; Att.-G. v. Lonsdale, L. R. 7 Eq. 388; 38 L. J. C. 335.

<sup>(</sup>h) Bristow v. Cormican, L. R. 3 Ap. Ca. 641.

<sup>(</sup>i) Pearce v. Scotcher, L. R. 9 Q.

B. D. 162; ante, p. 153. (j) Reece v. Miller, L. R. 8 Q. B. D. 626; 51 L. J. M. 64.

<sup>(</sup>k) Hale, De J. Maris, Harg. Tracts, 12; Horne v. Mackenzie, 6 Cl. & F. 628.

<sup>(</sup>l) 3 Co. Inst. 113; 4 Co. Inst. 135; Felthasen v. Ormsley, 3 T. R. 315; The Queen v. Cunningham, Bell, C. C. 72; 28 L. J. M. 66.

(m) Miles v. Rose, 5 Taunt. 705; per eur. Colchester v. Brooke, 7 Q. B.

<sup>(</sup>n) Pearce v. Scotcher, L. R. 9 Q. B. D. 162. See ante, p. 158.

stances of each river, are necessary for the full and convenient passage of vessels and boats along the channel;" therefore in a river in which at ebb tide the vessels navigating cannot float, it includes the right of grounding upon the bed of the river and there resting until the tide serves for continuing the navigation (o). It also includes the right of anchoring in the bed of the river, whenever necessary for navigation (p). "The right of soil in arms of the sea and public navigable rivers, which the Crown primâ facie has independently of any ownership in the adjoining lands, must in all cases be considered as subject to the public right of passage; and any grantee of the Crown must take subject to such right" (q). The Crown has jurisdiction "to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels but also for smaller as barges or boats" (r).—A tidal navigable river is not a part of the sea within the meaning of the Act, 48 Geo. III. c. 75, providing for the burial of dead bodies cast on shore from the sea (s).

The sea shore, as well of the open sea as of arms of the Property of sea and of tidal rivers, between high and low water marks, is Crown in sea shore. primâ facie the property of the Crown; but it may be the private property of a subject, by title of grant or of prescription (t). The property in the sea shore includes the minerals under it; and it seems that minerals under the open sea adjacent to the shore below low water mark are vested in the Crown (u).—The power of the Crown to Crown grants.

<sup>(</sup>o) Colchester v. Brooke, 7 Q. B.

<sup>(</sup>p) Gann v. Whitstable, 11 H. L. C. 192; 35 L. J. C. P. 29.

<sup>(</sup>q) Per cur. Colchester v. Brooke, 7 Q. B. 374; Gann v. Whitstable, 11 H. L. C. 192; 35 L. J. C. P. 29.

<sup>(</sup>r) Hale, De J. Maris, Harg. Tracts, 8; per cur. Williams v. Wilcox, 8 A. & E. 333; The King v. Russell, 6 B. & C. 566; The King

v. Ward, 4 A. & E. 384; Att.-G. v. Terry, L. R. 9 Ch. 423.

<sup>(</sup>s) Woolwich Churchwardens v. Robertson, L. R. 6 Q. B. D. 654; 50 L. J. M. 87.

<sup>(</sup>t) Hale, De J. Maris, c. vi. (u) Mayor of Penryn v. Holm, L. R. 2 Ex. D. 328; 46 L. J. Ex. 506; Att.-G. v. Chambers, 4 D. M. & G. 206; 23 L. J. C. 662.

alienate Crown lands, including the sea shore, was restricted by the statute 1 Anne, c. 7 (repealed by the Statute Law Revision Act, 1867) to leases for a term of thirty-one years or three lives. This statute was practically superseded by the statute 10 Geo. IV. c. 50, which empowered the Commissioners of Woods and Forests to sell Crown lands of all kinds. And by 29 & 30 Vict. c. 62, the powers of the Commissioners of Woods and Forests, as regards the foreshores of the United Kingdom, were transferred to the Board of Trade.

Grants of sea shore.

"The sea shore may not only belong to a subject in gross, but it may be parcel of a manor," and "de facto it many times is so; and perchance it is parcel of all such manors as by prescription have royal fish or wrecks of the sea within their manor; for these are perquisites that happen between the high water and low water mark. therefore that hath wreck of the sea or royal fish by prescription infra manerium, it is a great presumption that the shore is part of the manor, as otherwise he could not have them" (v). A grant of a manor "with wreck of the sea," though not in terms conveying the sea shore, may be sufficiently explained by evidence of possession and ownership to show that the sea shore was included as parcel of the manor (w). And in general an ancient grant of a manor described by name without describing the boundaries may be construed by evidence of modern possession and usage as including the sea shore (x).

Limits of sea shore.

The sea shore to which the presumptive title of the Crown or of a grantee of the Crown extends is bounded by the line of "ordinary" high tides; which is defined to be "the line of the medium high tide between the springs and the neaps," ascertained by taking the average of these medium tides during the year; because all land below that line is more often than not covered at high water,

<sup>(</sup>v) Hale, De J. Maris, Hargr. Tracts, 27.

<sup>(</sup>w) Att.-G. v. Jones, 2 H. & C. 347; 33 L. J. Ex. 249.
(x) Beaufort v. Swansca, 3 Ex.

<sup>413;</sup> Hastings v. Ivall, L. R. 19 Eq. 581; Lord Advocate v. Blantyre, L. R. 4 Ap. Ca. 770; Lord Advo-cate v. Young, L. R. 12 Ap. Ca. 544.

and therefore not capable of ordinary occupation (y) The land above the ordinary high water mark as above defined and which is only covered by the high spring tides presumptively belongs to the owner of the adjacent land (z). If the line of high tides recedes or advances gradually and imperceptibly, the property of the Crown shifts with it; being defined by the land between the high and low water marks for the time being. Hence "the Crown by a grant of the sea shore would convey, not that which at the time of the grant is between high and low water marks, but that which from time to time shall be between those two termini" (a). A conveyance from a grantee under the Crown of "all those sea-grounds, shores, and fisheries," described as extending from high to low water mark, and as containing an estimated acreage. was construed to pass so much of the shore as from time to time lay between high and low water marks, including gradual accretions as accessory to the principal (b). On the other hand, "lands from which the sea is gradually and imperceptibly removed by the alluvion of soil, becomes the property of the person to whose land it is attached, although it has been the fundus maris, and as such the property of the king" (c).

The sea shore between high and low water marks is part Jurisdiction of the adjoining county, as regards the jurisdiction of the over sea shore. common law (d). It is primû facie extra-parochial, but it may be within a parish, and it lies upon a parish claiming it to prove that it is so, the usual evidence of which is perambulations of the bounds, common reputation, known metes and divisions, and the like (e). Accord-

<sup>(</sup>y) Att.-G. v. Chambers, 4 D. M. & G. 206; 23 L. J. C. 662. (z) Lowe v. Govett, 3 B. & Ad. 863; Maddock v. Wallasey Board, 55 L. J. Q. B. 267.

<sup>(</sup>a) Per cur. Scratton v. Brown, 4 B. & C. 498; Re Hull and Selby Ry., 5 M. & W. 327.

<sup>(</sup>b) Scratton v. Brown, 4 B. & C.

<sup>485.</sup> 

<sup>(</sup>c) Gifford v. Yarborough, 5 Bing. 165; The King v. Yarborough, 3 B. & C. 91; Hale, De J. Maris, Hargr. Tracts, 14.

<sup>(</sup>d) Embleton v. Brown, 30 L. J. M. 1; 3 E. & E. 234.

<sup>(</sup>e) Hale, De J. Maris, Hargr. Tracts, 27.

ingly, the part of a pier extending into the sea between high and low water marks was held to be extra-parochial, in the absence of evidence to the contrary (d). It is now provided by 31 & 32 Vict. c. 122, "The Poor Law Amendment Act, 1868," s. 27, that "for all civil parochial purposes, every accretion from the sea, whether natural or artificial, and the part of the sea shore to the low water mark, and the bank of every river to the middle of the stream, not included within the boundaries of any parish, shall be annexed to and incorporated with the parish to which such accretion, part, or bank adjoins in proportion to the extent of the common boundary." This enactment was held not to extend to part of a pier built upon piles in the sea below low water mark; because that part of the pier is not within the realm, and therefore not rateable (e).

Public rights over sea shore.

The public have no general rights over the sea shore of passage to and fro, or of embarking or disembarking persons or goods, or of passing over the sea shore for the purpose of bathing in the sea (f). They may acquire special rights of way and other similar rights, by custom or dedication, in the same manner and to the same extent as over private property in general; and there may be a public right of way from one place to another over the sea shore, varying in direction according to the state of the tide (g). An owner of land adjoining the sea shore may acquire a special right of using the shore as access to the sea (h). "For the purpose of the king's subjects getting upon the sea to exercise their unquestionable rights of commerce intercourse and fishing there are the ports of the kingdom established from time to time by the king's prerogative" (i).

<sup>(</sup>d) The Queen v. Musson, 8 E. & B. 900; 27 L. J. M. 100.
(e) Blackpool Pier Co. v. Fylde Union, 46 L. J. M. 189.

<sup>(</sup>f) Blundell v. Catterall, 5 B. & Ald. 268.

<sup>(</sup>g) Maddock v. Wallasey Board,

<sup>55</sup> L. J. Q. B. 267.

<sup>(</sup>h) Att.-G. Straits Settlement v. Wemyss, L. R. 13 Ap. Ca. 192; 57 L. J. P. C. 62; ante, p. 157.
(i) Holroyd, J. Blandell v. Cattrall, 5 B. & Ald. 294; post, p.

<sup>169.</sup> 

Grants of sea shore by the Crown are taken to be subject Prerogative to the prerogative rights and duties vested in the Crown rights and duties. for the benefit of the public; and they are subject to all rights which may be created by Act of Parliament in the interests of the public, with or without compensation for private damage caused by their exercise (j).—It is a pre-Protection of rogative right and duty of the Crown to protect the realm sea shore. from waste of the sea by maintaining unimpaired the sea shore as the natural defence, and by providing sea walls and other artificial defences where necessary. This prero- Commis- . gative office of the Crown has been regulated from time to sewers. time by the Statutes of Sewers, under which commissioners of sewers are appointed for the purpose of executing it (k). Hence a grantee of sea shore, though prima facie entitled to exercise all rights of ownership, may be restrained from any act that would impair the efficiency of the shore as the natural defence against the sea, such as excessive digging and removing of shingle; and a landowner whose property is threatened or injured by such act, may claim an injunction and damages (1). So if a riparian owner cuts through the natural protecting bank of a tidal river, or an artificial wall erected by the Crown or the commissioners of sewers, he is liable for damage done by an overflow of water into adjacent land (m).

There is no obligation at common law upon an owner of Sea walls. land fronting the sea to maintain a sea wall for the benefit of the other frontagers; beyond the above-mentioned obligation to abstain from any act injurious to the rights and duties of the Crown and of commissioners of sewers in that

<sup>(</sup>j) Att.-G. v. Tomline, L. R. 14 C. D. 58; 49 L. J. C. 377; Blantyre v. Clyde Navigation, L. R. 6 Ap. Ca.

<sup>(</sup>k) Case of the Isle of Ely, 10 Co. (N) Case of the LSW of Edg, 10 Co. 141; per cur. Hudson v. Tabor, L. R. 2 Q. B. D. 293; 46 L. J. Q. B. 463; see the statutes 6 Hen. VI. c. 5; 23 Hen. VIII. c. 5; 3 & 4 Will. IV. c. 22; and the Land Drainage Act, 1861, 24 & 25 Vict.

c. 133. (l) Att.-G. v. Tomline, L. R. 14 C. D. 58; 49 L. J. C. 377.

<sup>(</sup>m) West Norfolk Farmers' Co. v. Archdale, L. R. 16 Q. B. D. 754; 55 L. J. Q. B. 230; Nitro-Phosphate Co. v. London Docks, L. R. 9 C. D. 503; cited ante, p. 145; as to damages, see Rust v. Victoria Dock Co., L. R. 36 C. D. 113.

behalf. But a frontager may be subject to such an obligation by prescription or custom; and he may be compelled to perform it by the other frontagers as well as by the commissioners of sewers (n). The prescriptive liability depends in general upon usage; and it may be proved by evidence of former repairs done by the frontager and his predecessors in title under similar circumstances. obligation can be inferred from the mere fact that he has voluntarily, and without any claim or order made against him, maintained and repaired a wall for the protection of his own land; though it has also served to protect the land of the other frontagers (o). Proof of liability for ordinary repairs is not sufficient to charge a frontager with the damage caused by an extraordinary tide or storm, that could not reasonably be anticipated; the liability would, in general, be discharged by keeping the sea wall in sufficient repair to withstand all ordinary tides and storms (p). So, between tenant for life or for years and reversioner "it is waste to suffer a wall of the sea to be in decay, so that by default of the tenant the land is drowned and becomes unprofitable; but if the land is drowned by the extraordinary violence of the sea without his fault, it is no waste" (q).—A frontager has the right of erecting a sea wall or such other work as may be necessary for the protection of his own land, although the effect may be injurious to the land of others. Upon this principle it was held that commissioners of sewers appointed for a certain level might erect works for the protection of their level, though the sea was thereby diverted with greater violence against the adjoining land; and that they could not be compelled either to protect the latter, or to make compensation (r).

<sup>(</sup>n) Keighley's Case, 10 Co. 139; The King v. Essex, 1 B. & C. 477; (o) Hudson v. Tabor, L. R. 2 Q. B. D. 290; 46 L. J. Q. B. 463. (p) The King v. Essex, 1 B. & C. 477; The Queen v. Fobbing, L. R. 11

Ap. Ca. 449; 53 L. J. M. 113. (q) Co. Lit. 53 b; Keighley's Case, 10 Co. 139 b; antc, pp. 18, 92. (r) The King v. Commiss. of Pagham, 8 B. & C. 355.

"Ports are not merely geographical expressions, they Ports. are places appointed for persons and merchandises to pass into and out of the realm; and at such places only is it lawful for ships to load and discharge cargo. Their limits and bounds are necessarily defined by the authority which creates them, and the area embraced within those limits constitutes the port" (s). The term is also used for fiscal purposes as the place of taking custom duties imposed by Act of Parliament, the limits being fixed by the Act; these limits may be different from those of the legal port within which port dues may be chargeable. The limits of the port or district for pilotage purposes may also be different, as fixed by other statutes (t).—The term "port" is also used in a popular or commercial sense in charterparties, policies of insurance, and other commercial documents relating to shipping. In this sense it refers to foreign as well as English ports, and receives a construction, not limited to the strict legal definition of a public port, but according with the intention of the parties apparent in the document in question with reference to the circumstances (u).

It was formerly a prerogative of the Crown to appoint Franchise of ports; also to grant ports to be held as franchises by port. subjects (r). The Crown might create a port and grant the franchise in the land of a subject, so as to render it lawful to the public to use it as a port; but the Crown could not grant the right of landing and unloading goods without the consent of the owner of the land. And the owner of land is entitled to make charges for such use of his land in connection with a port, without any title to the port as a franchise (w).—"Ports are also acquirable by

<sup>(</sup>s) Per cur. Nicholson v. Williams, L. R. 6 Q. B. 641; 40 L. J. M.

<sup>(</sup>t) Brett, M. R. Garston Co. v. Hickie, L. R. 15 Q. B. D. 587; Nicholson v. Williams, supra.

<sup>(</sup>u) Garston Co. v. Hickie, L. R.

<sup>15</sup> Q. B. D. 580.

<sup>(</sup>v) Hale, De J. Maris, Part II., where a catalogue of then existing ports, with their members, is given. Hargrave's Tracts, p. 48.

<sup>(</sup>w) Hale, De Port, Hargr. Tr. 73, 76; Bayley, J. Blundell v. Cat-

prescription, without any other formality appearing, though presumed; ex diuturnitate temporis omnia præsumuntur rite acta" (x). And a grant of a port within time of legal memory may be presumed from long possession and the taking of dues, though the deed or charter, which should be matter of record, cannot be directly proved (y).

Disturbance of franchise.

"No subject may institute or erect a common port without the charter of the king, or a lawful prescription." The use of any place, not being a lawfully appointed port, for the arrival and unloading of ships is a disturbance of the "Yet further it seems that a subject cannot, franchise. neither could by law at any time after customs were settled, arrive with customable goods and ships of his own at his own land; for this were to defeat the king of his duty." "But any man might bring and unlade his own private goods which are not customable upon his own land; for this was no accroachment of a port at common law." And "in case of necessity, either of stress of weather, assault of pirates, or want of provisions, any ship might put into any creek or haven; all places are as to that purpose and end ports" (z).

Statutory authority over ports. The prerogative right of ports is now superseded by statutory authority. The statute 9 & 10 Vict. c. 102, repealed and re-enacted by "The Customs Consolidation Act, 1853," 16 & 17 Vict. c. 107, and by "The Customs Consolidation Act, 1876," 39 & 40 Vict. c. 36, vested the appointment of ports in the Commissioners of the Treasury. By the last mentioned Act, s. 11, "The Commissioners of the Treasury may, by their warrant, appoint any port, subport, haven or creek in the United Kingdom or in the Channel Islands, and declare the limits thereof, and appoint proper places within the same to be legal quays for the lading and unlading of goods, and declare the bounds and extent of any such quays, and annul the

terall, 5 B. & Ald. 309; Exeter v. Warren, 5 Q. B. 773.
(x) Hale, De Port, Hargr. Tracts, 54.

<sup>(</sup>y) Hull v. Horner, Cowp. 102. (z) Hale, De Port, Hargr. Tracts, 51, 53.

limits of any port, already appointed or to be hereafter set out and appointed, and declare the same to be no longer a port, or alter or vary the names, bounds and limits It is further provided, "that any port so appointed shall be deemed to be a port within the meaning and for the purposes of any other public Act for the protection of the ports, harbours, shores and navigable rivers of the United Kingdom or any part thereof "(a).

There is commonly incident to public ports the right to Port dues. take tolls or duties for the use of the port, as for anchorage, wharfage and the like; which cannot be taken without a lawful title by charter or prescription (b). The right to take dues may be proved by long usage, though the grant was within time of legal memory and the charter, which ought to be matter of record, cannot be produced (c). For the validity of tolls some consideration is necessary; but "the mere creation of the port, with the consequent right in all subjects to use the range within the limits as a port, to bring their ships there for safety, and to trade there, and unload customable goods would be consideration sufficient in law to support the grant of the duties" (d). There may be other considerations incident to the franchise of a port, as the obligation of repairing, clearing and maintaining the port; of furnishing capstans, cranes, wharfs, warehouses and other conveniences for harbouring and lading and unlading ships; and of measuring or providing the means of measuring goods imported. The nonperformance of these obligations may render the owner liable to proceedings against him; but it is no answer to a demand of port-dues, unless they are claimed as charges for specific services (e).

Mayor of Exeter v. Warren, 5 Q. B.

<sup>(</sup>a) Nicholson v. Williams, L. R. 6 Q B. 632; 40 L. J. M. 159.
(b) Hale, De Port, Hargr. Tracts,

<sup>(</sup>c) Hull v. Horner, Cowp. 102. (d) Mansfield, C. J., Yarmouth v. Eaton, 3 Burr. 1406; per cur.

<sup>(</sup>e) Per cur. Mayor of Exeter v. Warren, 5 Q. B. 800; Jenkins v. Harvey, 2 C. M. & R. 393; Hale, De Portibus, c. vi, Hargr. Tracts, 76.

Wreck of the sea, as to the property therein, is of two

kinds: namely, goods cast upon the land or sea shore; and

Wreck of the 869..

Crown.

goods found in the sea. Goods cast upon the shore by shipwreck (which is the strict legal meaning of the term wreck), are within the jurisdiction of common law, and Prerogative of by prerogative right belong to the Crown. Goods cast upon the shore which are not legally wreck, may be taken by the Crown, subject to the owner claiming them within a year and a day (e). Wreck found in the sea is described by the legal terms of jetsam, flotsam and lagan, meaning respectively goods cast into the sea, goods floating, and goods fastened to a buoy for recovery. kind of wreck, if found in the sea between high and low water mark, or.in any haven, port, creek, or arm of the sea, or tidal river, which belongs to the Crown, also primâ facie belongs to the Crown; but subject to the claim of the owner of the goods if he can be known, and subject to the payment of salvage to him who recovers the wreck. Wreck found in the open sea beyond the limits of the prerogative of the Crown becomes the property of the taker, subject to the rights of the original owner if he can be ascertained; in which case the taker becomes entitled only to be paid for salvage (f).—The prerogative right of the Crown to take wreck of the sea, both wreck cast on land and floating wreck, may be granted to a subject to be held as a franchise; and it may be vested in a subject by prescription, or as appurtenant to a manor. term "wreck of the sea" is construed strictly to pass such goods only as are cast on land by the sea, and not to include floating wreck (g).

Franchise of wreck.

Receivers of

By the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 439, "The Board of Trade shall throughout the

wreck.

<sup>(</sup>e) Stat. West. 3 Ed. I. c. iv, declaratory of common land, 2 Co. Inst. 166; Stat. Prerog. Regis, c. xiii, Statutes, Revised ed., p. 132; Hale, De J. Maris, Hargr. Tracts, 37; Constable's Case, 5 Co. 106.

<sup>(</sup>f) Hale, De J. Maris, Hargr. Tracts, 41; 5 Co. 107, 108, Constable's Case.

<sup>(</sup>g) Hale, De J. Maris, Hargr. Tracts, 41; Constable's Case, 5 Co. 106.

United Kingdom have the general superintendence of all matters relating to wreck," and it is empowered to appoint certain officers to be "receivers of wreck," to perform the duties prescribed in the Act relating to the receiving and disposal of wreck. By s. 474, "The Board of Trade shall have power, with the consent of the Treasury, for and on behalf of her Majesty, to purchase all such rights to wreck as may be possessed by any person or body corporate, other than her Majesty"; and for the purpose of facilitating such purchases, the provisions of the Lands Clauses Consolidation Act, 1845, are incorporated. By the interpretation clause, s. 2, "in the construction and for the purposes of this Act, the term 'wreck' shall include jetsam, flotsam, lagan, and derelict, found in or on the shores of the sea or any tidal water."

#### CHAPTER XII.

#### INLAND AND SEA FISHERIES.

Fishery in inland waters-non-tidal rivers.

Fishery in land of another—several fishery—free fishery and common of fishery—qualified fishery.

Fishery in the open sea-Sea Fisheries Acts.

Fishery in arms of the sea and tidal waters—Crown grants of fishery—prescriptive fishery—non-tidal waters.

Fishing weirs—in navigable rivers—in private rivers.

Royal fish-salmon-oysters and shell fish.

Fishery in inland waters.

The right of fishing in inland water which is private property, as a lake or pond, is an ordinary incident of the ownership of the land and water. It is sometimes called a "several fishery," but only in the same sense that the ownership of the land is a "several" ownership, and not as being a separate subject of property (a). Hence the possession and exercise of a several or exclusive right of fishing, in the absence of other evidence respecting the title, is referable to the ownership of the land, and affords presumptive evidence of a title in fee (b). And the term "fishery" in a deed of conveyance, as descriptive of the property conveyed, may pass the land itself covered with water, if apparently used with that intention (c).

Non-tidal rivers.

The right of fishing in non-tidal rivers and inland streams is presumptively in the riparian owners ad medium filum aquæ. If one person be the owner of both banks, he has the entire fishing to the extent of his land in length.

<sup>(</sup>a) Per cur. Holford v. Bailey, 13

B. & C. 875; post, p. 176.
(c) Marshall v. Ulleswater Nav.,
(b) Duke of Somerset v. Fogwell, 5

3 B. & S. 732; 32 L. J. Q. B. 139.

It is presumptively an incident of the property in the bank and bed of the river (d). But the exercise of an exclusive right of fishery in a river is prima facie evidence of property in the bed of the river, and may be sufficient in connection with the circumstances to rebut the presumptive right of the riparian owners (e). If a river changes its course gradually and insensibly, the boundaries of the riparian property, together with the incidental rights of fishing, change with it; but if it changes its course suddenly, or if it abandons the old course and takes a new one, the property in the soil is not changed, and the right of fishing does not pass to the new course (f).—Tidal Tidal rivers. rivers are treated as arms of the sea, the property in which is presumptively in the Crown; and although the water be fresh at high water, if it flow and reflow with the tide, it follows the rule of tidal waters (a).

The right of fishing in water which for all other uses is Fishery in the property of another, is a right of the nature of a profit another. à prendre. Such right is an incorporeal tenement and hereditament; it passes by deed of grant; an action of trespass lies for an injury to it; and an action of ejectment lies for its recovery. It may be claimed by grant or prescription, but not by custom (h).—A "several fishery" Several is a right of fishing in the land of another, exclusively of fishery. the owner himself and of all other persons. The term is used to describe the fishing as a separate subject of property, in distinction to fishery as the ordinary incident of property in the land and water. "A several fishery is a right to take fish in alieno solo, and to exclude the owner of the soil from the right to take fish himself" (i). A "sole

(i) Coleridge, C. J., Foster v. Wright, L. R. 4 C. P. D. 449; 49 L. J. C. P. 100.

<sup>(</sup>d) Hale, De Jure Maris, ch. i, Hargr. Tracts, 5; ante, p. 153.
(e) Devonshire v. Pattinson, L. R.
20 Q. B. D. 263; 57 L. J. Q. B. 189.

<sup>(</sup>f) Ante, p. 154. (g) Hale, De Jure Maris, Hargr. Tracts, 12, post, p. 178.

<sup>(</sup>h) Ashhurst, J., The King v. Old Alresford, 1 T. R. 361; Somerset v. Foywell, 5 B. & C. 875; Holford v. Bailey, 13 Q. B. 426; Neill v. Devonshire, L. R. 8 Ap. Ca. 135, post, pp. 330, 562.

and exclusive fishery" is an equivalent description of a

"several fishery." "These words contain a description of precisely the same right as is ordinarily expressed by the term 'several fishery,' that is, the right of fishing exclusive of all others in a particular place "(j). The exercise of a several and exclusive fishery, as an act of ownership, is presumptive evidence of a title to the soil; but this is true only "where the terms of the grant are unknown; and where they appear and are such as convey an incorporeal hereditament only, the presumption is destroyed" (k). "If a man be seized of a river and by deed do grant separatom piscariam in the same, the soil doth not pass, nor the water, for the grantor may take water there; and if the river become dry he may take the benefit of the soil; for there passed to the grantee but a particular right. For the same reason, if a man grant aquam suam the soil shall not pass, but the pischary within the water passeth therewith "(l).—A right of fishing in the land of another in common with the owner, or in common with others to whom similar rights are granted, is called a "free fishery," or liberty of fishing; and relatively to others having the like right, it is called a "common of fishery." "A man may prescribe to have separalem piscariam in such a water and the owner of the soil shall not fish there; but if he claim to have communian piscariæ or liberam piscariam, the owner of the soil shall fish there "(m). "In order to constitute a 'several fishery' it is requisite that the party claiming it should so far have the right of fishing independent of all others, as that no person should have a coextensive right with him; for where any person has such co-extensive right, there is only a 'free fishery'" (n).—

Free fishery.

Common of fishery.

<sup>(</sup>j) Holford v. Bailey, 13 Q. B. 445.

<sup>(</sup>k) Duke of Somerset v. Fogwell,
5 B. & C. 886; Devonshire v. Pattinson, L. R. 20 Q. B. D. 263; 57
L. J. Q. B. 189.
(l) Co. Lit. 4 b; Grove, J., Salt-

ash v. Goodman, L. R. 5 C. P. D.
440; 49 L. J. C. P. 570.
(m) Co. Lit. 122 a; Hargrave's
note, ib.; Smith v. Kemp, 2 Salk.
637; 4 Mod. 186.
(n) Mansfield, C. J., Seymour v.
Courtenay, 5 Burr. 2817.

The grant of a fishery may also be qualified or restricted Qualified to a particular kind of fish, as a fishery for oysters; or a grant may be made of the floating fish, reserving the oysters (o). A fishery may also be restricted as to the particular mode of fishing (p).

regulations of each state over its own territorial waters. By "The Sea Fisheries Act, 1868," 31 & 32 Vict. c. 45, Sea Fisheries statutory effect is given to a convention between the sove- Acts. reigns of the United Kingdom and France relative to fisheries in the seas between those countries, which is set out in a schedule to the Act. By this convention it is agreed, Article I., that "British fishermen shall enjoy the exclusive right of fishery within the distance of three miles from low water mark along the whole extent of the coasts of the British Islands;" and French fishermen shall enjoy the like exclusive right of fishery within the same distance along the coast of France. "The distance of three miles fixed as the general limit for the exclusive right of fishery shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland." "The Sea Fisheries Act, 1883," 46 & 47 Vict. c. 22, statutory effect is given to an international convention regulat-

ing the fisheries in the North Sea, in similar terms. convention is made between the sovereigns of the United Kingdom, Germany, Belgium, Denmark, France, and the Netherlands, and by Article I. applies to the subjects of the contracting parties. By Article II., "The fishermen of each country shall enjoy the exclusive right of fishery within the distance of three miles from low water mark along the whole extent of the coasts of their respective

Fishing in the open sea is common to all persons of all Fisheries in nations, subject to international treaties, and subject to the

<sup>(</sup>o) Rogers v. Allen, 1 Camp. 312; Seymour v. Courtenay, 5 Burr. 2817. (p) The King v. Ellis, 1 M. & S. 652.

countries, as well as of the dependent islands and banks. As regards bays, the distance of three miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles." Article IV. fixes the limits of the North Sea for the purpose of the convention.

Fisheries in arms of the sea and tidal waters. The right of fishing in arms of the sea and in tidal rivers is  $prim \hat{a}$  facie common to all subjects of the realm (o). The public right extends with the tide to high water; and it seems that it includes a general right of taking fish found upon the sea shore when the tide is out, and of going upon the shore for that purpose (p).

Crown grants of fishery.

In early times the Crown, in whom the territorial property in arms of the sea and tidal rivers was vested at common law, claimed and exercised the right of granting the franchise or liberty of fishing therein to private grantees, to the exclusion of the general public, until restrained by the Great Charter and the subsequent renewals thereof. By the Charter of John, c. 47, it was declared that all waters should be open that had been closed by that King himself. And by the subsequent Charters 9 Henry III. c. 16, and 25 Edw. I. c. 16, it was provided that "No rivers shall be defended from henceforth, but such as were in defence in the time of King Henry II., by the same places and the same bounds as they were wont to be in his time." Consequently it is now held that any private fishery claimed in arms of the sea or in tidal waters must be founded upon a Crown grant that can be proved, or at least presumed, to have been made not later than the reign of Henry II. (q). If the grant of a fishery made before that date has since reverted to the Crown, by forfeiture or otherwise, it is not

<sup>(</sup>o) Hale, De Jurc Maris, c. iv; Fitzwalter's Case, 1 Mod. 105; Ward v. Creswell, Willes, 265.

<sup>(</sup>p) Bagott v. Orr, 2 B. & P. 472; but see Bayley, J., Blundell v. Catterall, 5 B. & Ald. 307.

<sup>(</sup>q) Blackst. Tracts, Mag. Cart.; 2 Blackst. Com. 39; see Somerset v. Fogucil, 5 B. & C. 875; Malcolmson v. O'Dea, 10 H. L. C. 593; Carlisle v. Graham, L. R. 4 Ex. 361; 38 L. J. Ex. 226.

thereby merged or extinguished; it continues to exist as a distinct franchise that may validly be re-granted (r). And a nominal surrender to the Crown for the purpose of a modern re-grant does not destroy the right (s). Hence it appears that "the Crown can grant a several fishery in such waters since Magna Charta, if that fishery existed before Magna Charta." And "if the Crown's patent purports to grant a several fishery, and the grant is followed by sufficient user of it as such, that is always held sufficient evidence that the fishery existed before Magna Charta" (t).—A. Crown grant thus legalised may be a "several fishery" strictly so called, that is, exclusive of all other persons; or it may be a "free fishery," that is, a mere liberty of fishing, exclusive of the public in general but not exclusive of any other grantees to whom the like liberty may be given; in relation to whom it becomes a "common of fishery" (u). And it is said that "the King may grant fishing in some known precinct that hath known bounds, though within the main sea," as an exclusive right of fishing between high and low water marks of the open sea (v). A crown grant may be made to a body corporate; or to a section of the public, as the inhabitants of a borough, provided the terms of the grant expressly or impliedly incorporate them, so as to enable them to hold the franchise in a corporate capacity (w).

A claim to a several fishery or to a free fishery in arms of Prescriptive the sea and tidal rivers may also be supported by prescription; and immemorial enjoyment of a several or free fishery is presumed to have had the legal origin of a valid

<sup>(</sup>r) Colchester v. Brooke, 7 Q. B. 339; Northumberland v. Houghton, L. R. 5 Ex. 127; 39 L. J. Ex. 66. (s) Mayor of Saltash v. Goodman,

<sup>(</sup>t) L. Blackburn, Neill v. Devon-shire, L. R. 8 Ap. Ca. 180. (u) Hale, De J. Maris, c. v, Hargr.

Tracts, 17; Case of Banne Fishery, Sir J. Davies, 55; Malcolmson v.

O' Dea, 10 H. L. C. 593; ante, p. 175.
(v) Hale, De J. Maris, supra; see
Embleton v. Brown, 3 E. & B. 234;
30 L. J. M. 1.

<sup>(</sup>w) Saltash v. Goodman, L. R. 7 C. D. 106; 50 L. J. C. P. 508; Goodman v. Saltash, L. R. 7 Ap. Ca. 633; 52 L. J. Q. B. 193; Re Free Fishers of Faversham, 57 L. J. C. 187. See post, p. 565.

grant from the Crown, upon the principle of presuming everything to be rightfully done in favour of an established usage (x). Accordingly the grant may be presumed to have been made subject to exceptive rights or conditions in favour of the public or of certain classes of the public, in accordance with the evidence of prescriptive enjoyment(y); but such presumption cannot be made to displace a title to an absolute several fishery founded upon documents and possession, and in such case exceptive enjoyments will be presumed to have been either with licence or by sufferance (z). A several fishery may also be claimed as prescriptively appurtenant to a manor (a). But the general presumption is against a several fishery and in favour of the public; therefore if the claimant prosecutes for unlawful fishing and his claim is disputed a question of title arises sufficient to oust the summary jurisdiction of justices (b).

Non-tidal waters.

The public in general have no right of fishing in nontidal waters and rivers; for such waters, with the fisheries therein, are presumptively private property; nor can any public right of fishing in non-tidal waters be acquired by custom, such right being a profit à prendre in alieno solo which cannot be founded on custom (c). Nor has the Crown any prerogative right of fishing in a non-tidal river, the property of a subject, nor of granting a franchise of fishery in such river to a subject (d).—A public right of navigation in a navigable non-tidal river is limited to the purposes of navigation and does not carry with it any right of fishing (e).

(x) Hale, De J. Maris, Hargr. Tracts, 18, 19; Carter v. Murcot, 4 Burr. 2162; Mannall v. Fisher, 5 C. B. N. S. 856; Malcolmson v. O'Dea, 10 H. L. C. 573.

(y) Goodman v. Saltash, L. R. 7 Ap. Ca. 640; 52 L. J. Q. B. 193. (z) Neill v. Duke of Devonshire, L. R. 8 Ap. Ca. 135.

(a) Rogers v. Allen, 1 Camp. 309. (b) The Queen v. Stimpson, 4 B. & S. 301; 32 L. J. M. 208. (c) Lloyd v. Jones, 6 C. B. 81; Bland v. Lipscombe, 24 L. J. Q. B. 155, n.; Hudson v. Macrae, 4 B. & S. 585; 33 L. J. M. 65; Hargreaves v. Diddams, L. R. 10 Q. B. 582; 44 L. J. M. 178; ante, p. 162; see post, p. 562.
(d) Devonshire v. Pattinson, L. R.

20 Q. B. D. 263; 57 L. J. Q. B.

(e) Reece v. Miller, L. R. 8 Q. B. D. 626; 51 L. J. M. 64; Pearce v.

The Crown also in early times exercised a prerogative Fishing right of erecting weirs or dams for fishing in arms of the weirs. sea and tidal rivers, which are Crown property, to the exclusion of public rights of fishing and of navigation; and of granting such weirs, which are part of the soil itself, in private ownership to individuals or corporate bodies. But by the Charter of 25 Ed. I. c. 23, confirming the Public navi-Magna Charta of John, it was enacted that "All weirs gable rivers. from henceforth shall be utterly put down by Thames and Medway, and through all England, except by the sea coast." This statute being general in its terms would primâ facie apply to all rivers public or private, but the generality of the statute was held to be restrained by later statutes to public navigable rivers only (f). And by the statute 25 Ed. III. st. 4, c. 4, reciting that the common passage of ships and boats in the great rivers of England is often disturbed by the levying of weirs to the damage of the people, provided that "all such weirs which were levied and set up in the time of Edward I. and after, till now, in such rivers, whereby the said ships and boats shall be disturbed, shall be put out and utterly pulled down without being renewed." This and subsequent statutes in similar terms, 1 Hen. IV. c. 12, 4 Hen. IV. c. 11, 12 Ed. IV. c. 7, have been recently repealed by the Statute Law Revision Act, 1863, but with express saving of past operations and existing rights. This statute, in expressly restricting the operation to weirs set up in the time of Edward I. and after, was construed as impliedly legalising all weirs set up before that time, notwithstanding that they obstructed the channels of public navigable rivers, whatever doubt there might be as to the original authority of the Crown to grant

Scotcher, L. R. 9 Q. B. D. 162; Hargreaves v. Diddams, L. R. 10 Q. B. 582; 44 L. J. M. 178; Lecon-field v. Lonsdale, L. R. 5 C. P. 665. The dictum in the cases of Warren v. Matthews, 6 Mod. 73; 1 Salk. 357, and in Carter v. Murcot, 4 Burr. 2164, that in navigable rivers the fishery is public, applies to tidal rivers only.

(f) Callis on Sowers, p. 259, cited in Rolle v. Whyte, L. R. 3 Q. B. 300; Leconfield v. Lonsdale, L. R. 5 C. P. 657; 39 L. J. C. P. 305.

them (g). Accordingly it is stated as law that "a subject may have weirs, fishing places, &c., which are the very soil itself, by usage, either in gross or as parcel of or appurtenant to manors; and this not only in navigable rivers and arms of the sea, but in creeks, ports and havens, and in certain known limits in the open sea contiguous to the shore" (h). So it was held that a fishing weir in a public navigable river, presumptively granted by the Crown before the reign of Edward I., was legal, though the weir occupied part of the navigable channel; and that it did not become illegal by the river changing its course so that the whole navigable channel was obstructed (i).

Weirs in private rivers.

In private rivers, that is to say, inland non-tidal rivers, whether navigable or not, the right to erect weirs and dams, whether for fishing or for other purposes, with the effect of penning back or diverting the water, may be acquired against other riparian proprietors by grant or by prescription or other title applicable to such rights; but no such right can be acquired against a public right of navigation (j). By the Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109, s. 12, for the protection of the Salmon Fishery, the use of fishing weirs for catching salmon was prohibited generally "except such fishing weirs as are lawfully in use at the time of passing of the Act by virtue of a grant or charter or immemorial usage;" and the use of the excepted weirs is restricted by special regulations (k).

Royal fish.

By the statute *Prerogativa Regis*, 17 Ed. II. c. 11, which is declaratory of the common law, "the king shall have whales and sturgeons taken in the sea or elsewhere within the realm, except in certain places privileged by the king." "Royal fish are so called because of common right such

<sup>(</sup>g) Chester Mill Case, 10 Co. 137 b; Williams v. Wilcox, 8 A. & E. 314.

<sup>(</sup>h) Hale, De J. Maris, Hargr. Tracts, 18.

<sup>(</sup>i) Williams v. Wilcox, 8 A. & E.

<sup>314.</sup> 

<sup>(</sup>j) Rolle v. Whyte, L. R. 3 Q. B. 286; 37 L. J. Q. B. 105; Leconfield v. Lonsdale, L. R. 5 C. P. 657; 39 L. J. C. P. 305; ante, p. 151.

<sup>(</sup>k) Leconfield v. Lonsdale, supra.

fish, if taken within the seas parcel of the dominion and Crown of England or in any creeks or arms thereof, belong to the Crown; but if taken in the wide sea or out of the precinct of the seas belonging to the Crown, they belong to the taker. The kinds of these royal fish seem to be but three, viz., sturgeon, porpoise, and whale." "A subject may have this franchise or royal perquisite, by grant and by prescription, within the shore between the high water and low water mark, or in a certain distinct district of the sea, or in a port or creek or arm of the sea; and this may be had in gross, or as appurtenant to a manor" (1).— Salmon are not distinguished from other fish as regards Salmon. the property or right of taking; except that numerous Acts of Parliament have been passed from time to time for the special preservation of salmon, and for the regulation of the fishery. By the law of Scotland the right of salmon fishing in all rivers and in the sea round the coasts belongs to the Crown jure coronæ; except so far as it has been granted by the Crown to subjects. And it lies upon those who maintain the right as against the Crown to show their title by an express or constructive grant of the salmon fishery (m).—The public right of fishing in the sea Oysters and and tidal waters includes the taking of oysters and shell shell fish. fish, subject to the statutes passed for the regulation of the fishery (n). It also includes the taking of fish found upon the sea shore between high and low water upon the ebbing of the tide; at least, where they can be taken without trespassing. But it seems there is no similar right to take fish shells, which in some places are a valuable commodity (o).

<sup>(1)</sup> The Statutes, Revised Ed. p. 132; Hale, De J. Maris, Hargr. Tracts, 43; Mildnay v. Page, Times, 10 Nov. 1883, in which case a whale caught in the river Crouch, within the manor of Burnham, was successfully claimed by the lord of the manor.

<sup>(</sup>m) Gammell's Case, 3 Macq. 419; McDonall v. Lord Advocate, L. R. 2 Sc. Ap. 432; Lord Advocate v. Lovat, L. R. 5 Ap. Ca. 273.

(n) Mayor of Maldon v. Woolvet,

<sup>12</sup> A. & E. 13.

<sup>(</sup>o) Bagott v. Orr, 2 B. & P. 472.

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# PART II.

# USES AND PROFITS IN LAND OF ANOTHER.

CHAPTER I. Easements.

II. Profits à prendre.

III. Rents.

IV. Public uses of land

### INTRODUCTION.

It has been already noticed in the Introduction to the Rights in land former Part of this work that some uses and profits of of another. land may be appropriated separately from the general ownership. They may be held by one person, while the land which supplies them, for all other uses and profits, belongs concurrently to another person; whose general rights of ownership are necessarily to a corresponding extent diminished or restricted. Rights of this kind are here designated as rights of use and profit in the land of another, adopting the phrase jura in re aliena of the Roman law; which also designated them by the term servitutes, in reference to the land subjected to them.

property, but only the use of it for certain purposes, or some profit derived from it, whilst it remains in the possession of another. Being incorporeal they are incapable, technically speaking, of entry, seisin, disseisin or livery; they do not lie in tenure, and therefore do not admit of reservation of rent or service, or of distress (a). Also, being incapable of livery, they are said at common law to lie in grant, that is to say, they pass by deed only, whether for an estate in fee or for life or for years; except that when appendant or appurtenant to land they pass by any conveyance that is sufficient to pass the land to which they

requiring a feoffment with livery to be evidenced by deed; (a) Co. Lit. 9 a, b; 142 a; 181 u. (b) Co. Lit. 49 a; 121 b; 172 a.

are appended (b). The chief importance of this distinction has been taken away by the statute 8 & 9 Vict. c. 106,

These are incorporeal rights, because the owner has not Incorporeal possession of the land which is the corporeal subject of rights.

and enacting that "all corporeal tenements and hereditaments shall be deemed to lie in grant as well as in livery."

Easements.

Rights of this kind are distinguished as being Easements or rights of mere use, and Profits to be taken or rendered out The former consist in the owner of certain of the land. land being entitled to have some specific use of the land of another for the more convenient use of his own land, but without taking any material profit out of it; as a right of way, or a right of access of light, or a right to use a watercourse. Accordingly an easement is defined to be "a privilege that one neighbour hath of another without profit; as a way or a drain through his land, or such like" (c).—The latter or profitable kind of rights include rights of taking some material profit from land of another, as the right of pasturing cattle, of taking wood or turf or fuel, or of taking minerals or part of the soil; and rights of receiving a profit out of land to be rendered by the tenant in money or kind, as rent. The profits to be taken by the person himself are said, in the language of the common law, to lie in prender, and are called profits à prendre; and profits to be received at the hand of the tenant are said to lie in render (d).

Profits à prendre.

Rents.

Conditions of legality.

It is a necessary condition of a claim or right over land of another that it be strictly defined and limited. Uncertainty of description or extent renders the claim void. On the other hand, general ownership of land, as regards the uses and profits, is indefinite and unlimited, including every mode in which the land can be lawfully used or employed. Accordingly it is said, "Servitus or easement gives a power of applying the subject to exactly determined purposes. Property or dominion gives the power of applying it to all purposes" (e).—It is a further condition that the claim be of a kind recognised by law. "There are certain known incidents to property and its enjoy-

<sup>(</sup>c) Termes de la ley. (d) Co. Lit. 141 b. (e) Austin, Jur., v. III. p. 3.

ment; certain burthens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognised by the law. In respect of enjoyment, one may have the possession and the fee simple, and another may have a rent issuing out of it, or the tithes of its produce, or an easement, as a right of way upon it, or of common over it. And such last incorporeal hereditaments may be annexed to an estate which is wholly unconnected with the estate affected by the easement. All these kinds of property, however, are well known to the law and familiarly dealt with by its principles. But incidents of a novel kind cannot be devised and attached to property at the caprice of the owner. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote " (f).

Covenants or personal obligations affecting the use and Covenants enjoyment of land, referred to above, may become to a running with land. certain extent annexed to the land, or, as it is called, run with the land by reason of the nature of the covenant. They may also become obligatory upon purchasers or assignees of the land by reason of their taking it with notice of the covenants. These covenants have then some analogy in effect with easements or rights over the land of another by subjecting the use of the land to the terms of the covenant; which, however, being mere matter of agreement are capable of wider and more varied scope than the

<sup>(</sup>f) Brougham, L. C., Keppell v. Bailey, 2 M. & K. 535; adopted in Ackroyd v. Smith, 10 C. B. 188; and in Hill v. Tupper, 2 H. & C.

<sup>121; 32</sup> L. J. Ex. 217; Mellish, L. J., Aspden v. Seddon, L. R. 1 Ex. D. 509; 46 L. J. Ex. 353.

easements recognised by law. On the other hand they are only binding upon the actual parties to the covenant and those who become implicated as parties, and they are attended with different forms of remedy; being regulated by the law of contract to which branch of law they properly belong.

Public easements.

There remains to be noticed a class of rights which resemble easements in being used or exercised over land held in private property, but which differ from easements in not being vested exclusively in any individual person. These are vested in the public generally, that is, in every individual member of the public, as such, or at least in some locally defined portion of the public and its individual members. Of this kind are highways and public rights of way of all kinds; also various uses of land founded upon local customs. Such rights are held by the public, not as appurtenant or annexed to land, but independently of any land or, as it is termed, in gross. They may be described as Public and Local Uses of the nature of Easements.— The public cannot, nor can any portion of the public, merely as such, claim to take Profits from land in private ownership, by any form of grant, prescription, or custom.

In accordance with the above explanation this Part of the work is arranged in the following Chapters.

### CHAPTER I.

#### EASEMENTS.

Section I. Easements in general.

II. Specific easements.

III. Creation of easements.

IV. Extinction of easements.

V. Remedies for easements.

#### Section I. Easements in general.

Easements appurtenant to land—dominant and servient tenement easement in gross.

Conditions of appurtenancy.

Positive and negative easements.

Licence to use land-revocation of licence-notice of revocation-licence not assignable.

Licence coupled with grant—parol grant—grants irrevocable—and assignable.

Easements admissible in law-specific easements-particular easements -claims not admitted as easements-covenants concerning use of land.

Easements are rights appurtenant or annexed to the Easements ownership of certain land, of using the land of another appurtenant to land. person as auxiliary to it, that is, for the more convenient use and occupation of it, in addition to the ordinary incidents of ownership; so that a conveyance of the land carries with it the appurtenant easements, together with the ordinary possessory uses, without any separate conveyance or mention of the easements (a).

The land to which an easement is appurtenant is called, Dominant in the language of the civil law, the dominant tenement, and servient tenement.

relatively to the land over which the easement is exercised; the latter is called the servient tenement, and is said to be subject to a servitude. A dominant and a servient tenement in different owners is an essential condition of an easement. If the tenements become united in one owner, all rights of use and enjoyment for whatever purposes become the ordinary incidents of ownership; and an easement that had previously been appurtenant to one of them over the other, instead of continuing as a separate right, becomes merged in the full ownership. A person cannot have an easement or servitude over his own land; or as expressed in the language of the civil law, nulli res sua servit (b).—An easement, properly so called, can be claimed only as appurtenant to land; it cannot be claimed in gross, that is, as a separate right independent of a dominant tenement. "There can be no such thing, according to our law, as an easement in gross; an easement must be connected with a dominant tenement" (c). A grant in terms of an easement in gross would confer a personal licence only, which would be subject to all the incidents and conditions of a licence (d). In this respect easements differ from profits à prendre, or rights of taking profits from land; for the latter may be claimed in gross; but the right to take profits may carry with it a right of way or other easement as an accessory to the enjoyment, although such easement could not be claimed separately in gross(e).

Easement in gross.

Conditions of appurtenancy.

An easement can be made appurtenant to land in law only if, and so far as, it serves for the accommodation of the occupier in the use of the land. "The incident sought to be annexed, so that the assignee of the land may take advantage of it, must be beneficial to the land in respect of the ownership; and perhaps a further limit may be put, that it must be an incident of a known and usual kind.

<sup>(</sup>b) Digest, L. 26, de serv. præd.; see post, pp. 297, 310.
(c) Cairns, L. C., Rangeley v. Midland Ry., L. R. 3 Ch. 311. (d) Post, p. 194. (e) See post, pp. 327, 348.

Beyond these limits these incidents cannot be made appurtenant to land and the occupier cannot prescribe for them; but he must claim them by an ordinary conveyance "(f). For instance an easement of way over land of another for all purposes whatsoever cannot be claimed as appurtenant; the claim must be restricted to such purposes only as may be for the use and convenience of the dominant tenement. "It would be a novel incident annexed to land, that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of road over other land; and a grant of such a privilege or easement can no more be annexed, so as to pass with the land, than a covenant for any collateral matter" (g). But a grant of a way expressed to be "for all purposes" must be construed presumptively to mean all purposes connected with the land of the grantee, so that it may be taken as legally appurtenant. "There is no authority for holding that the generality of this expression 'for all purposes' makes a right of way not appurtenant, where it is expressed to be to or from a particular piece of land "(h).—It is sufficient if the easement is beneficial for the particular business carried on upon the dominant tenement; as the right of erecting the sign of a public house on the adjacent land or buildings (i); the right of keeping a hatch upon a stream for the use of a mill(j); the right of keeping a mooring pile fixed in a river for the use of a wharf (h).—The appurtenancy may be to the tenement in its entirety only, or to every part of the tenement, according to the nature of the subservience .

<sup>(</sup>f) Willes, J., Bailey v. Stevens, 12 C. B. N. S. 91; 31 L. J. C. P. 226; Jessel, M. R., Baylis v. Tyssen-Amurst, L. R. 6 C. D. 507; ante, p. 187.

<sup>(</sup>g) Ackroyd v. Smith, 10 C. B.

<sup>(</sup>h) Mellish, L. J., Thorpe v. Brumfitt, L. R. 8 Ch. 658, post,

<sup>p. 201.
(i) Moody v. Steggles, L. R. 12
C. D. 261; 48 L: J. C. 639; Hoare
v. Metrop. Board, L. R. 9 Q. B.
296; 43 L. J. M. 65.
(j) Wood v. Hewett, 8 Q. B. 913.
(k) Lancaster v. Eve, 5 C. B. N. S.</sup> 

Thus a right of way to a house and yard of the right. was held to be appurtenant to the entire tenement for its use as a house only; so that a severance of the yard from the house did not carry with it a right to use the way as appurtenant to the yard (1). But a right of way to land, merely as land, is generally taken as subservient to every part of the land for legitimate purposes; so that upon severance of the land each separate tenement carries with it a right to the way for its own use, as an appurtenance (m). A right of way awarded under an Inclosure Act to the allottees and the owners for the time being of the allotments, upon the allotments being partitioned into several tenements, was held to become appurtenant to each tenement (n). So a right of way appurtenant to a common for the use of the commoners, after an inclosure and allotment in severalty, was held to be appurtenant to each allotment (o).

Positive and negative easements.

Easements are distinguished, according to the civil law, as being positive and negative easements; a distinction which depends upon the subjects of the easements. Positive or affirmative easements are those which consist in some act to be done by the owner of the dominant tenement upon the servient tenement. Negative easements require no act on the part of the dominant owner; they consist only in some forbearance or restriction of use of the servient tenement. But all easements have a negative effect in preventing the owner of the servient property from using it in any manner inconsistent with the easement. "The affirmative easement differs from · the negative easement in this, that the latter can under no circumstances be interrupted except by acts done upon the servient tenement; but the former constituting, as it does, a direct interference with the enjoyment by the servient

<sup>(1)</sup> Bower v. Hill, 2 Bing. N. C. 339.

<sup>(</sup>m) Jessel, M. R., Newcomen v. Coulson, L. R. 5 C. D. 141; 46 L. J. C. 461; Dynevor v. Tennant,

L. R. 33 C. D. 420; 55 L. J. C. 817.

 <sup>(</sup>n) Newcomen v. Coulson, supra.
 (o) Codling v. Johnson, 9 B. & C.
 933.

owner of his tenement, may be the subject of legal proceedings as well as of physical interruption. passage of light and air to your neighbour's windows may be physically interrupted by you, but gives you no legal grounds of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both" (o). A. use of the servient tenement which is neither actionable nor capable of physical interruption cannot found a prescriptive claim to an easement (p). But if it be capable of physical interruption, though not actionable, it is immaterial that the interruption of it may not be conveniently practicable; and no exception to the general law of prescriptive easements is admitted merely upon the ground that the easement claimed is negative rather than positive, or that the inchoate enjoyment of it before it has matured into a right is not an actionable wrong (q).— Examples of negative easements are: the free passage of light from the servient tenement; and rights to the free and uninterrupted flow of water through and from the servient to the dominant tenement.—Positive easements are: a right of way over the servient tenement; and rights of discharging water, or drainage, or noxious vapours over the servient tenement. The transmission and diffusion of noise or noxious vapours over the servient tenement is a positive easement which cannot be effectually opposed by physical obstruction; the only mode of resisting it is by action, when it amounts to an actionable nuisance (r). The right to support for buildings from adjacent land or buildings is a positive easement, because it involves a positive and continuous pressure upon the adjacent soil or

<sup>(</sup>o) Sturges v. Bridgman, L. R. 11 C. D. 864; 48 L. J. C. 790.
(p) Sturges v. Bridgman, supra.
(q) Selborne, L. C., Dalton v. Angus, L. R. 6 Ap. Ca. 796; 50

L. J. Q. B. 689. (r) Sturges v. Bridgman, L. R. 11 C. D. 852; 48 L. J. C. 785,

post, p. 221.

building, and the constant use of the soil or building to resist the pressure (s).

Licence to use land.

The owner of land may grant to another the use of his land for various purposes that are not appurtenant or servient to land of the grantee; and the grant, unless it conveys some legally recognised estate, operates only as a licence, justifying acts done under it that would otherwise be wrongful, but creating no easement in the proper meaning of the term. "A licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful; as a licence to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful" (t). And a licence to place or keep goods upon land of the licensor, as a stack of hay or coals, is of the same kind (u). A ticket of admission to a theatre, or a ticket of admission to a stand upon a racecourse operates as a mere licence justifying the act licensed, but giving no further interest (v). A grant by the proprietors of a canal of the exclusive right to use boats on the canal and to let them for hire for purposes of pleasure only, was held to give a mere licence to that effect, and to vest in the grantee no such interest in the canal as would entitle him to maintain an action in his own name against a third party; he could only sue in the name of the grantor, and with his permission (w). So, a mill-owner who had a licence from the proprietors of a canal to take water for the use of his mill, was held to have no remedy against a third party for polluting the water; inasmuch as such pollution might be allowed by the canal proprietors, who alone could complain of it (x). A deed of grant by the conservators of a river

<sup>(</sup>s) Dalton v. Angus, L. R. 6 Ap. Ca. 740; 50 L. J. Q. B. 689.

<sup>(</sup>t) Vaughan, C. J. Thomas v. Sorrell, Vaughan, 351, adopted in Wood v. Leadbitter, 13 M. & W. 844.

<sup>(</sup>u) Wood v. Lake, Sayer, 3; 13 M. & W. 848 (a); Webb v. Paternoster, Poph. 151.

<sup>(</sup>v) Tayler v. Waters, 7 Taunt. 374; Wood v. Leadbitter, 13 M. & W. 838.

<sup>(</sup>w) Hill v. Tupper, 2 H. & C. 121; 32 L. J. Ex. 217.

<sup>(</sup>x) Whaley v. Laing, Laing v. Whaley, 6 H. & N. 675; 27 L. J. Ex. 422.

of permission to construct a jetty upon the foreshore and bed of the river, which were vested in the conservators, was held to confer a licence only, and therefore not to require a stamp as a conveyance or instrument whereby any property is transferred or vested (y). But actual occupation under such licence may be rateable property (z).

A licence to use land for any purpose may be given Revocation of without deed or writing; but however given, whether by deed, writing, or by parol, it is essentially revocable. "A licence under seal, provided it be a mere licence, is as revocable as a licence by parol" (a). An express contract for the enjoyment of the licence would not preclude the licensor from revoking it in fact; subject to liability for the breach of contract, and for loss occasioned by the revocation (b). Accordingly it was held that an ordinary ticket of admission to a stand and inclosure upon a race course, though sold for money, gave the buyer only a licence, which the proprietor could revoke at any time at his mere will and pleasure, thereby putting the licensee in the position of a trespasser if he refused to quit, and, so far as concerned the revocation, without the condition of returning the money; and that the right of entering and remaining upon the stand and inclosure for a certain time could not be effectually granted otherwise than by a deed (c).—A licence to build upon land is revocable at any time, even after it has been acted upon by building; but the circumstances may be such as to give an equitable right to restrain the revocation, or to claim some equitable relief for the expense incurred (d); and the materials may remain the property of

<sup>(</sup>y) Thames Conservancy v. Inland Revenue, L. R. 18 Q. B. D. 279; 56 L. J. Q. B. 181.

<sup>(</sup>z) Cory v. Bristow, L. R. 2 App. Ca. 262; 46 L. J. M. 273; Taylor v. Pendleton, L. R. 19 Q. B. D. 288; 56 L. J. M. 146.

(a) Wood v. Leadbitter, 13 M. & W. 845.

<sup>(</sup>b) Wood v. Leadbitter, supra; Taplin v. Florence, 10 C. B. 744;

<sup>20</sup> L. J. C. P. 137; Smart v. Jones, 15 C. B. N. S. 717; 33 L. J. C. P.

<sup>(</sup>c) Wood v. Leadbitter, 13 M. & W. 838, overruling Tayler v. Waters, 7 Taunt. 374; see Butler v. Manchester and Lincolnshire Ry., L. R. 21 Q. B. D. 207.

<sup>(</sup>d) The King v. Horndon on Hill, 4 M. & S. 562; Perry v. Fitzhowe, 8 Q. B. 757.

the builder, notwithstanding the revocation (d). ings be erected or expense incurred by a person upon the land of another under an expectation raised by the owner of the land of obtaining a certain estate or interest, a Court of equity will compel the owner to give effect to such expectation (e).—Upon the same principle a licence to have or use a drain or watercourse through the land of another, unless made appurtenant to land under a grant by deed, is revocable (f); but if the licensee have incurred expense in constructing the watercourse under an expectation of the licensor granting a permanent title, the latter will be restrained in equity from interfering with it (g).

Notice of revocation.

The revocation of a licence does not operate to put the licensee in the position of a trespasser, until he has received notice of the revocation (h). And "the licensee has a right to a reasonable time to go off the land after the licence has been withdrawn before he can be forcibly thrust off it; and he could bring an action if he were thrust off before such a reasonable time had elapsed" (i). So in the case of a licence to deposit goods upon land of the licensor, the licensee is entitled to a reasonable time after notice of revocation of the licence to remove the goods (k). licensee is, in this respect, in a position analogous to that of a tenant at will, who, upon a determination of the will by the landlord, becomes entitled to have a reasonable time for the removal of himself and his goods (1).

Licence not assignable.

A licence not conveying any estate or interest is personal to the licensee, and is not assignable to another; thus the

(d) Harrison v. Parker, 6 East,

& R. 418.

(g) Devoushire v. Elghin, 14 Beav.

530; 20 L. J. C. 495.

(1) Co. Lit. s. 69; Cornish v. Stubbs, supra; Doc v. M'Kaeg, 10 B. & C. 721.

<sup>(</sup>e) East India Co. v. Vincent, 2 Atk. 83; Ramsden v. Dyson, L. R. Atk. 83; Ramsden v. Dyson, L. R. 1 H. L. 129; Plinmer v. Mayor of Wellington, 53 L. J. P. C. 105; L. R. 9 Ap. Ca. 699; Price v. Neault, L. R. 12 Ap. Ca. 110; McManus v. Cooke, L. R. 35 C. D. 681; 56 L. J. C. 662.
(f) Fentiman v. Smith, 4 East, 107; Hewlins v. Shippam, 5 B. & C. 221; Cocker v. Cowper, 1 C. M.

<sup>(</sup>h) Doe v. Wilson, 11 East, 56.
(i) Willes, J., Cornish v. Stubbs,
L. R. 5 C. P. 339, citting Rolfe, B.,
Wood v. Leadbitter, 13 M. & W. 838.
(k) Cornish v. Stubbs, L. R. 5 C.
P. 334; 39 L. J. C. P. 202; Mellor
v. Watkins, L. R. 9 Q. B. 400.

grant of a way in gross, not appurtenant to any land, is a personal licence to the grantee only, and cannot be assigned (m). A mere licence of pleasure, as to walk in a park or garden, or to fish, hunt, or shoot, without taking any profit or property in the fish or animals killed, extends only to the person of the licensee; it cannot be exercised with servants or others by the authority or assignment of the licensee (n). But a licence to enter and take a profit, as a licence to take minerals, or a licence to kill and take game, is in general assignable, as granting a profit à prendre (o).—A licence is also personal as regards the licensor; so that if the land be assigned to another, whether by his act or by act of law, the licence is determined at once and without notice to the licensee (p). parol licence to build on land, though executed, was held to be inoperative against a subsequent owner of the land in whom the estate of the licensor became vested; who therefore became entitled to pull down the house (q). So, a parol licence to an outgoing tenant to keep his fixtures on the land after the expiration of his lease, was held to be revoked by a new lease given to the incoming tenant; such an interest in the land as would avail against the latter could only be granted by deed (r).

A licence coupled with a valid grant of property can- Licence not be revoked so as to defeat the grant. "A licence to a grant. person to hunt in a man's park and carry away the deer killed to his own use; to cut down a tree in a man's ground and to carry it away to his own use; are licences as to the acts of hunting and cutting down the tree; but as to the carrying away the deer killed and tree cut down they are grants." If the grant be good, the licence to enter upon the

<sup>(</sup>m) Per cur. Ackroyd v. Smith, 10 C. B. 188.

<sup>(</sup>n) Per cur. Wickham v. Hawker, 7 M. & W. 77, citing Duchess of Norfolk v. Wiseman, Manwood's Forest Law, p. 286, 3rd ed. (o) Ante, p. 53. See post, pp. 329,

<sup>(</sup>p) Wallis v. Harrison, 4 M. & W. 538.

<sup>(</sup>q) Perry v. Fitzhowe, 8 Q. B.

<sup>(</sup>r) Ruffey v. Henderson, 17 Q. B. 574; 21 L. J. Q. B. 49.

land to take the subject of it is irrevocable by the grantor,

who can do nothing in derogation of his own grant (s). Upon this principle if goods are sold, being upon the land of the seller, upon the express terms that the buyer may enter and take them away, the licence thus given for that purpose is irrevocable (t). But such a licence is not necessarily implied in law upon a sale of goods from the mere fact of the goods then being upon the land of the seller (u). An auctioneer employed to sell goods upon certain premises with licence to enter for that purpose has not such an interest in the goods sold as renders the licence irrevocable; though a revocation of the licence may be a breach of the contract implied in his employment (r).--"A licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a licence by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence; it is not incident to a valid grant, and it is therefore revocable "(w). Upon this principle a contract for the sale of an interest in land which fails to satisfy the requirements of the Statute of Frauds, though it may operate as a licence to the buyer to act under it until revoked, is revocable by the seller; as a merely verbal sale of a growing crop of grass together with a licence to enter upon the land to take it (x); or an agreement for a right of shooting over land and taking away the game killed (y).

Licence with parol grant.

Licence coupled with grant is assignable.

A licence coupled with a grant is assignable with the property or interest granted: thus a licence to enter upon

(s) Vaughan, C. J., Thomas v. Sorrell, Vaughan, 351, adopted in Wood v. Leadbitter, 13 M. & W. 844; and in Muskett v. Hill, 5 Bing. N. C. 707.

(t) Wood v. Manley, 11 A. & E.

(u) Williams v. Morris, 8 M. & W. 488.

(v) Taplin v. Florence, 10 C. B. 744; 20 L. J. C. P. 137.

(w) Wood v. Leadbitter, 13 M. & W. 845.

(x) Crosby v. Wadsworth, 6 East,

602; Carrington v. Roots, 2 M. & W. 248.

(y) See Webber v. Lee, L. R. 9 Q.
 B. D. 315; 51 L. J. Q. B. 485.

land for the purpose of cutting and carrying away wood sold, is assignable with the vested property in the wood (z). A licence to fish, hunt, or shoot and carry away the animals killed, being a profit à prendre, is assignable (a); and the person entitled to such profit may give licences to others to act under it (b). A licence to search for and raise minerals and convert them to the licensee's own use passes an assignable interest (c).

Easements are restricted by law to certain kinds of use; Easements which must satisfy the general conditions of being defi-law. nitely limited in their effect upon the servient tenement, and of being beneficial to the dominant tenement. is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land and annex them to it: nor can the owner of land render it. subject to a new species of burthen, so as to bind it in the hands of an assignee" (d). An easement must be "a right of utility and benefit, and not one of mere recreation and amusement; incident to and annexed to property for its more beneficial and profitable enjoyment, and not for mere pleasure" (e).—The easements generally Specific easerecognised by law may be referred to various specific kinds. ments. which are hereafter treated separately in detail; namely, ways, light, air, water, support, fences.

Claims to easements, not distinctly referable to any of Particular the above kinds, also occur, and have become the subjects easements. of judicial decision, as in the following cases; which, it may be observed, consist mostly of claims to place goods upon land of another for various purposes. A claim to use an adjacent wall for nailing trees was held to be a claim to an easement, which required to be specially

<sup>(</sup>z) Palmer's case, 5 Co. 24 b; Basset v. Maynard, Cro. Eliz. 819. (a) Wickham v. Hawker, 7 M. &

<sup>(</sup>b) Jones v. Williams, 46 L. J. M. 270.

<sup>(</sup>c) Muskett v. Hill, 5 Bing. N. C. 69à.

<sup>(</sup>d) Per cur. Ackroyd v. Smith, 10
C. B. 188, ante, pp. 186, 190.
(e) Per cur. Mounsey v. Ismay, 3
H. & C. 486; 34 L. J. Ex. 56.

pleaded in an action of trespass (f). A claim incident to a fishery of drawing fishing nets to land upon the banks of a private river, was held to be an easement which was established by the usage (g). A claim alleged generally to use an adjoining close for hanging and drying linen, was held not to be supported by proof that the occupiers of the dominant tenement had done so for the use of their families only (h). A claim by the owner of a dock for the vessels using the dock to extend their bowsprits over the adjoining wharf of another owner, was treated as a legal easement which might be acquired by grant or prescription (i). A claim by the owner of a wharf adjoining a public navigable river to fix piles in the bed of the river for the purpose of mooring and unlading vessels at the wharf, was held to be so far of the nature of an easement that the piles though fixed to the bed of the river remained his property (j). So there may be an easement of placing a fender on the bank of a stream for keeping up the water of a mill (k). An easement may be maintained of erecting a sign-post upon adjacent land for the use of a public-house (l); or of attaching a sign-board to the wall of another house (m). A facia formed of cement attached to a house, and used for exhibiting the name of the occupier and the number in the street of a neighbouring house, was held to pass by a lease of the latter as constituting part of the house, and not as a mere easement or use of the house to which it was attached (n).—An easement may be appurtenant to a messuage for the occupiers to use a particular pew or seat in the parish church for attending divine service; and the title to such easement may

<sup>(</sup>f) Hawkins v. Wallis, 2 Wils.

 <sup>(</sup>g) Gray v. Bond, 2 B. & B. 667.
 (h) Drewell v. Towler, 3 B. & Ad. 735.

<sup>(</sup>i) Suffield v. Brown, 33 L. J. C.

<sup>(</sup>j) Lancaster v. Eve, 5 C. B. N. S. 717. As to moorings in a

river, see Cory v. Bristow, L. R. 1 C. P. D. 54; 45 L. J. M. 145.

<sup>(</sup>k) Wood v. Hewett, 8 Q. B. 913.

<sup>(</sup>l) Hoare v. Metrop. Board, L. R. 9 Q. B. 296; 43 L. J. M. 65. (m) Moody v. Steggles, L. R. 12 C. D. 261; 48 L. J. C. 639.

<sup>(</sup>n) Francis v. Hayward, L. R. 22 C. D. 177; 52 L. J. C. 291.

be founded upon a faculty granted by the Ordinary, or upon prescription which implies such a faculty. But "it is only on account of the pew being annexed to a house that the temporal Courts can take cognizance of it" (o). Such an easement being the result of a faculty and not the subject of a grant is not within the Prescription Act (p). The Court will issue a prohibition to restrain an Ecclesiastical Court from trying a claim by prescription to a pew in a parish church (q). Every inhabitant of a parish has the right of entering the parish church for the purpose of attending divine service; and though it may be the office of the churchwarden to distribute seats, he has no right to prevent an inhabitant from entering upon the ground that he cannot be conveniently accommodated (r).

The following claims have been disallowed as easements Claims not upon general principles: A claim to free and uninter-admitted as easements. rupted access of air and wind from the adjacent land for the use of a windmill; because too vague, undefined, and extensive to be recognised in law (s). A claim to uninterrupted access of air to and from the adjacent land for the service of the chimneys of a house; "the right is not one the law allows, being too vague and uncertain; one the acquisition of which the adjoining owner could not defend himself against" (t). Upon the same principle a claim to uninterrupted access of light cannot be supported as an easement to open ground; the right can only be claimed as appurtenant to houses and buildings (u). The

<sup>(</sup>o) Mainwaring. v. Giles, 5 B. & Ald. 356; Byerley v. Windus, 5 B. & C. 1; Brumfitt v. Roberts, L. R. 5 C. P. 232; 39 L. J. C. P. 95; Crisp v. Martin, L. R. 2 P. D. 15.

<sup>(</sup>p) Haliday v. Phillips, "Times," 25 June, 1888, Day, J. (q) Re Bateman, L. R. 9 Eq. 660; 39 L. J. C. 383; Byerley v. Windus,

<sup>(</sup>r) Taylor v. Timson, L. R. 20 Q. B. D. 671; 57 L. J. Q. B. 216. As to the use of the parish church

and churchyard for burying the dead, see Fryar v. Johnson, 2 Wils. 28; Bryan v. Whistler, 8 B. & C.

<sup>(</sup>s) Webb v. Bird, 10 C. B. N. S. 268; 13 ib. 841; 31 L. J. C. P. 335; L. Blackburn, Dalton v. Angus, L. R. 6 Ap. Ca. 824.
(t) Bryant v. Lefever, L. R. 4 C. P. D. 172; 48 L. J. C. P. 380.

<sup>(</sup>u) Roberts v. Macord, 1 M. & Rob. 230; Potts v. Smith, L. R. 6 Eq. 311; 38 L. J. C. 58.

claim to an uninterrupted prospect over land cannot be maintained as an easement. "For prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof;" and "it has been held expedient that the right of prospect, which would impose a burden on a very large and indefinite area, should not be allowed, except by actual agreement" (x). Also a claim cannot be supported, as an easement for a house or shop, to be uninterruptedly open to view from a distance, though such view may be valuable; as in the case of trade premises, that they should be conspicuous to the public (y). Nor can a person claim an easement to prevent the adjacent owner opening windows to overlook his land. "The Court will not interfere on the mere ground of invasion of privacy; a party has a right to open new windows, although he is thereby enabled to overlook his neighbour's premises, and so interfere with his comfort." A person can protect the privacy of his land only by building upon Compensation it to the exclusion of his neighbour's view (z).—Upon the principle that prospect, privacy, peace and quietness, freedom from the noise and dust of public traffic, and other like amenities and advantages of situation are not proper subjects of legal rights, they are also not subjects of compensation, under the Lands Clauses and Railway Clauses Acts, to owners of lands that are "injuriously affected" by the execution of public works; the phrase "injuriously affected" being construed to refer only to injuries in the strict legal sense, for which damages may be claimed (a). But in the case of any land or any easement appurtenant to land being taken, for which a claim for compensation arises, the amount may be assessed at the full depreciation

for prospect, privacy, &c.

<sup>(</sup>x) Aldred's Case, 9 Co. 58 a; L. Blackburn, Angus v. Dalton, L. D. DRUKGUTTI, Angus v. Datton, L.
R. 6 Ap. Ca. 824; see Byles, J.,
Webb v. Bird, 10 C. B. N. S. 276;
Mellish, L. J., Leech v. Schweder,
L. R. 9 Ch. 475; 43 L. J. C. 492.
(y) Smith v. Owen, 35 L. J. C.
317; Butt v. Imperial Gas Co., L.

R. 2 Ch. 158. E. Z Un. 158.

(z) Kindersley, V.-C., Turner v. Spooner, 1 Dr. & Sm. 467; 30 L. J. C. 801; Re Penny and S. E. Ry., 7 E. & B. 660; 26 L. J. Q. B. 225.

(a) Ricket v. Metrop. Ry., L. R. 2 H. L. 175; 36 L. J. Q. B. 205.

of the rest of the land, including loss of prospect, or of privacy, or of other like advantages caused by the application of the property taken to the purposes intended (b).

All such matters as above mentioned, though not proper Covenants subjects of easements, may be made the subjects of cove- use of land. nant, so as to give a right similar to an easement against the covenantor, so long as he continues the owner of the land affected; for he is at liberty to bind himself by contract, as he thinks proper, in respect to the use or application of the land in his possession. Such covenants do not, in general, affect or charge the land permanently; though, under certain circumstances, they might become binding in equity upon persons taking the land with notice of the obligations created by them (c).

## Section II. Specific Easements.

§ 1. Ways.—§ 2. Light.—§ 3. Air.—§ 4. Water.—§ 5. Support.— § 6. Fences.

## § 1. WAYS.

Ways general and limited.

Ownership of land subject to way.

Limitation of ways by grant—construction of grant as to purposes of way-as to mode of use.

Limitation by prescription.

Ways impliedly limited to service of dominant tenement.

Direction and width of wav-deviation.

Construction of ways-repair of ways.

A right of way over land of another may be a general Ways right of passage for all purposes connected with the domi- general and limited. nant tenement; or it may be a limited right of passage for certain purposes only, as for agriculture, mining, the

<sup>(</sup>b) Buccleuch v. Metrop. Board, L. R. 5 H. L. 418; 41 L. J. Ex. 137.

<sup>(</sup>c) Mellish, L.J., Leech v. Schweder, L. R. 9 Ch. 475; 43 L. J. C. 492; Leake on Contracts, Part VI. c. 2. See ante, p. 187.

carriage of minerals, the carting of timber, the fetching of water, attending market or church. The right may also be general or limited in respect to the manner of use; as a carriage way, a bridle way, a foot way, or a way for cattle. A claim of way must be alleged in pleadings and legal proceedings according to its limitation, and it must be proved according to the allegation. A claim alleged too largely may fail from defect or variance in the proof (a); but it is immaterial that the proof exceeds the allegation, if it sufficiently includes it (b).

Ownership of the land.

The owner of the servient tenement retains the property in the land subject to the right of way, and may exercise all rights of property which do not interfere with the reasonable use of the way (c). The use of an unlimited way is in itself an act of ownership, and is  $prim\hat{a}$  facie evidence of entire ownership of the land in the absence of evidence or presumption to the contrary; so where a road divided two properties which was used equally by the owners of both, it was held that, in the absence of other evidence of ownership, half the road along its length belonged to each owner, with an appurtenant right of way over the other half. It seems that such a way would presumptively be available for all purposes and modes of use, because each owner is entitled so to use it upon his own half (d).

Limitations of way.

A way is limited and defined, according to the nature of the title by grant or prescription, either by the express terms of the grant, or by the actual use upon which the prescriptive title is founded. "In proving a right by pre-

<sup>(</sup>a) Ballard v. Dyson, 1 Taunt. 279; Higham v. Rabett, 5 Bing. N. C. 622; Drewell v. Towler, 3 B. & Ad. 735; Brunton v. Hall, 1 Q. B. 792.

<sup>(</sup>b) Duncan v. Louch, 6 Q. B. 914; Davies v. Williams, 16 Q. B. 546;

<sup>20</sup> L. J. Q. B. 330.

<sup>(</sup>c) Clifford v. Hoare, L. R. 9 C. P. 362; 43 L. J. C. P. 225. (d) Holmes v. Bellingham, 7 C.

<sup>(</sup>d) Holmes v. Bellingham, 7 C. B. N. S. 336; 29 L. J. C. P. 134; Mellish, L. J., Bradburn v. Morris, L. R. 3 C. D. 823.

scription the user of the right is the only evidence. In a grant the language of the instrument can be referred to, and it is for the Court to construe that language" (e). A claimant is required to allege in pleadings whether he claims by grant or by prescription (f).

A grant of a way in general terms is construed with Limitation reference to the circumstances of the dominant tenement. by grant. as being open land, or land covered with houses and buildings; also with reference to the nature of the servient way, as being constructed or adapted for foot passengers only, or for horses and carriages and other kinds of traffic. The way may be defined and limited by such circumstances, subject to the express terms of the grant admitting of the construction (q). A way set out for allotments under an Inclosure Act as "a private carriage road and driftway for the use of the owners and occupiers," was construed to be a general way for all purposes, in respect of the unlimited ownership of the allottees (h). The level crossings on a railway, required by statute, are not restricted to the purposes of the adjoining land in its then state and condition; but may be used for every purpose to which at any future time the owner of the land may think fit to appropriate it, subject only to the regulations of the railway traffic (i). Land compulsorily taken by a local board was held to carry with it a way of necessity over land of the grantor, for all purposes for which the board was constituted (i). The grant of a way expressed to be "to a loft, and the space or opening under the loft then used as a wood-house," was construed as giving a way only for pur-

<sup>(</sup>e) Willes, J., Williams v. James, L. R. 2 C. P. 577; 36 L. J. C. P. 256; Mellish, L. J., United Land Co. v. Great Eastern Ry., L. R. 10 Ch. 590; 44 L. J. C. 688.

(f) Harris v. Jenkins, L. R. 22 C. D. 481; 52 L. J. C. 437.

(g) Mellish, L. J., United Land Co. v. Great Eastern Ry., supra; Jessel, M. R., Cannon v. Villars, L.

R. 8 C. D. 420; 47 L. J. C. 599.

<sup>(</sup>h) Finch v. Great Western Ry., L. R. 5 Ex. D. 254; Newcomen v. Coulson, L. R. 5 C. D. 133; 46 L. J. C. 459.

<sup>(</sup>i) United Land Co. v. Great Eastern Ry., supra.

<sup>(</sup>j) Serff v. Acton Local Board, L. R. 31 C. D. 679; 55 L. J. C. 569.

poses compatible with the space remaining open; so that the space having afterwards been built over and converted into a dwelling-house, it could no longer be considered open for the purpose of the grant, and gave no right of way for the dwelling-house (k). "In the absence of any clear intention of the parties the maxim that a grant must be construed most strongly against the grantor must be applied;" and a general grant of way would be construed as a grant for all purposes connected with the dominant tenement (1).—As regards the mode of use, a way "on foot and for horses, cattle and sheep," was held not to include the right of "leading" manure, that is, of drawing it on wheels (m). A right of way granted to the lessee of a dock over a passage at the side of the dock "for him and his workmen and all persons by his authority or permission" was construed as limited to foot passengers only, excluding carriages and horses (n). A grant of the right of making a railway for the carriage of coals and minerals was construed as not admitting the use of the railway for carrying passengers (o). A right of way may be granted for the limited purpose of building upon adjoining premises and during the continuance of the building only (p).

Mode of use.

Limitation of ways by prescription.

In a prescriptive right of way, which implies an original grant, the limitation of the way is inferred from the evidence of the use; for it is presumed that the use has been according to the grant (q). "If a way has been used for several purposes, it may be ground for inferring that there is a right of way for all purposes; but if the evidence shows a user for one purpose or for particular purposes only, an inference of a general right would hardly be pre-

<sup>(</sup>k) Allan v. Gomme, 11 A. & E. 759; Finch v. Great Western Ry., L. R. 5 Ex. D. 259. (l) Willes, J., Williams v. James,

<sup>(</sup>l) Willes, J., Williams v. James, L. R. 2 C. P. 581; 36 L. J. C. P. 256.

<sup>(</sup>m) Brunton v. Hall, 1 Q. B. 792.

<sup>(</sup>n) Cousens v. Rose, L. R. 12 Eq. 366.

<sup>(</sup>c) Durham & Sunderland Ry. v. Walker, 2 Q. B. 940.
(p) Ardley v. St. Pancras, 39

<sup>(</sup>p) Ardley v. St. Pancras, 39 L. J. C. 871.

<sup>(</sup>q) Ballard v. Dyson, 1 Taunt.

sumed "(r). Thus proof of the use of a way for carriages does not establish a claim to use the way for driving cattle; "a carriage way will comprehend a horse way, but not a drift way for cattle" (s). A prescriptive use of a way for agricultural purposes does not include the right of carrying minerals from the dominant tenement (t).—Also a prescriptive way is primâ facie limited to the requirements of the land when the use took place, and cannot be enlarged from time to time to the increase of the burthen upon the servient tenement. A right of way to a field would presumptively only be applicable to the land used as a field, and not extend to the use of a manufactory subsequently built upon the field (u). A right of way immemorially used for agricultural land and for agricultural buildings only, was held not to be applicable to carting materials for the conversion of the land into building land (v). An owner of agricultural land with an appurtenant way over adjacent land, having sold the land and reserved the minerals, was held to retain no right of way for working the minerals (w). But a general right of way for all purposes may be inferred from evidence of using the way for new purposes as often as occasion required (x).

A way, whether by grant or prescription, is impliedly Ways limited limited to the service of the dominant tenement; the to service dominant owner is not justified in using the way for other land after-tenement. wards purchased by him; or in making a colourable use of the way for the benefit of other land, so as to increase the easement over the servient tenement. Whether a particular act is a proper and reasonable use of the way within the right, or whether it is a merely colourable use of the

<sup>(</sup>r) Abinger, C. B. Cowling v. Higginson, 4 M. & W. 256; Mellish, L. J., Wimbledon Conserv. v. Dixon, L. R. 1 C. D. 371; 45 L. J. C. 353.

<sup>(</sup>s) Ballard v. Dyson, 1 Taunt. 279.

<sup>(</sup>t) Cowling v. Higginson, 4 M. & W. 245; Bradburn v. Morris, L. R. 3 C. D. 812.

<sup>(</sup>u) Willes, J. Williams v. James, L. R. 2 C. P. 582; 36 L. J. C. P.

<sup>(</sup>v) Wimbledon Conserv. v. Dixon, L. R. 1 C. D. 362; 45 L. J. C. 353. (w) Bradburn v. Morris, L. R. 3 C. D. 812.

<sup>(</sup>x) Dare v. Heathcote, 25 L. J. Ex. 245.

way for purposes in excess of the right, is a question of fact depending on the circumstances (y). Accordingly a way leave for the carriage of coals from certain land cannot be used for carrying coals from other land acquired under a different title, though part of the same coal field (z). A grant of a way for lessees to carry "the produce of mines demised or any other mines," was held to extend to all other mines worked by the same lessees (a).—Upon this principle a right of way by a certain road to premises situated at the end of the road does not justify the use of the road for access to other premises at intermediate points of the road (b); and it is said, "A public road differs from a private road in this; you may make an opening in your fence and go into it in any part of the length of the public road or at the end" (c). The landlord or reversioner of the dominant tenement, as well as the occupier, may use an appurtenant way for the purposes of his interest; "he may use the way to view waste, or demand rent, or to remove an obstruction " (d).

Direction and width of way.

The claimant of a right of way is required to allege and prove with reasonable certainty the termini of the way and the intermediate course which it takes, so far as necessary to maintain the right (e). The way may be expressly defined in direction and width by the grantor. "If the owner of the servient tenement does not point out the line of way, then the grantee must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable

<sup>(</sup>y) Howell v. King, 1 Mod. 190; Lawton v. Ward, 1 Ld. Raym. 75; Lauton v. Ward, 1 Ld. Raym. 75; Nkull v. Glenister, 16 C. B. N. S. 81; 33 L. J. C. P. 185; Walliams v. James, L. R. 2 C. P. 577; 36 L. J. C. P. 256; Finch v. Great Western Ry., L. R. 5 Ex. D. 264. (2) Dand v. Kingscote, 6 M. & W. 174; Durham & Sunderland Ry. v. Walker, 2 Q. B. 940. (a) Bidder v. North Staffordshive

<sup>(</sup>a) Bidder v. North Staffordshire

Ry., L. R. 4 Q. B. D. 412.

<sup>(</sup>b) Senhouse v. Christian, 1 T. R.
560; Henning v. Burnet, 8 Ex. 187;
22 L. J. Ex. 79; see South Mctrop.
Cometery Co. v. Eden, 16 C. B. 42.
(c) Chambre, J. Woodyer v. Had-

den. 5 Taunt. 132.

<sup>(</sup>d) Proud v. Hollis, 1 B. & C. 8. (e) Harris v. Jenkins, L. R. 22 C. D. 481; 52 L. J. C. 437; Rouse v. Bardin, 1 H. Bl. 352.

way and then the person is not entitled to go out of the way" (f). A grant of way without precisely defining the space entitles the grantee to such a roadway as is convenient for the nature and circumstances of the traffic; and he cannot complain of any obstruction that leaves him such a convenient way (g). Where the grant was of "a road of a width of not less than forty feet throughout its entire length," and it appeared that a portico was erected over the footway with the bases of the columns standing upon the carriage-way; it was held that the obstruction did not interfere with a reasonable use of the way and that it was not sufficiently material to give a cause of action (h). grant of a right of way over roads made through an estate "in the same manner and as fully as if the same were public roads" was held to give the right of way, as on a public road, over the whole width laid out, and not only over the metalled part (i). A way may be granted over every part of the servient tenement, without limitation of direction; as in a close or garden appropriated to the use of the owners of adjacent houses (j).

The grantee of a way is not justified in deviating from Deviation the defined way and taking another way over the servient from way. tenement, merely by reason of the way being impassable for want of repair (k); nor, if it becomes impassable by accident, as by the overflowing of a river; in such cases the repair or loss of the way falls upon the dominant owner (1). But "if the grantor of a private way places across the way an obstruction not allowing of easy removal, the grantee may go round to connect the two parts of his way on each side of the obstacle over the grantor's land

<sup>(</sup>f) Mellish, L. J., Wimbledon Conserv. v. Dixon, L. R. 1 C. D. 370; 45 L. J. C. 357.

<sup>(</sup>g) Harding v. Wilson, 2 B. & C.

<sup>(</sup>h) Clifford v. Hoare, L. R. 9 C. P. 362; 43 L. J. C. P. 225.

<sup>(</sup>i) Nicol v. Beaumont, 53 L. J. C.

 <sup>(</sup>j) Duncan v. Louch, 6 Q. B. 904.
 (k) Bullard v. Harrison, 4 M. & S. 387.

<sup>(1)</sup> Taylor v. Whitehead, 2 Dougl. 745.

without trespass" (m). And he retains this right of deviation so long as the obstruction remains, and without abandoning the original right of way (n). So if the way be partially obstructed by the grantor, the grantee may deviate on to other part of the premises in the reasonable exercise of his right; and what is reasonably necessary for the purpose depends in fact upon the circumstances (o).

Construction of ways.

A right of way imports in general the accessory right of making and maintaining a road sufficient to render the right effective. Thus, a carriage way imports the right to make a road sufficient to bear the ordinary traffic of a carriage (p). The grant of a right of way for the occupiers of a house was held to give the right of laying down flag stones upon the foot way in front of the door (q).—A grant of way for the express purpose of carrying coals was held to give the right of laying down a framed waggon way, which was necessary for carrying coals according to the usual practice of the neighbourhood (r); and under such grant a railroad of an improved description coming into use since the date of the grant may be laid down (s). But a grant of "a right of way as and for a waggon or cart road," for ordinary surface purposes, and not for the working of minerals, does not give the right of laying down a railway or tramway (t).

Repair of ways.

A right of way also imports the right of entering upon the servient tenement for the purpose of repairing the road

(m) Sclby v. Nettlefold, L. R. 9 Ch. 111; 43 L. J. C. 359; Robertson v. Gantlett, 16 M. & W. 289.

(n) Reignolds v. Edwards, Willes, 282; Lovell v. Smith, 3 C. B. N. S. 120; Dawes v. Hawkins, 8 C. B. N. S. 848.

(o) Hawkins v. Carbines, 27 L. J. Ex. 44.

(p) Newcomen v. Coulson, L. R. 5 C. D. 143; 46 L. J. C. 459.

(q) Gerrard v. Cooke, 2 B. & P. N. R. 109.

(r) Senhouse v. Christian, 1 T. R. 560. See Abson v. Fenton, 1 B. & C. 195.

(s) Dand v. Kingscote, 6 M. & W. 174.

(t) Bidder v. North Staffordshire Ry., L. R. 4 Q. B. D. 412; see Ardley v. St. Pancras, 39 L. J. C. 871. when necessary; but it implies no condition or obligation to repair, further than that if the owner of the dominant tenement wants to have the way repaired, he must repair it himself (u). Nor is there any implied obligation upon the grantor of a way to repair it. "As a general rule easements impose no personal obligation upon the owner of the servient tenement to do anything, the burden of repair falls upon the owner of the dominant tenement." The servient owner can be charged with repairs only by express covenant or agreement, or by some prescriptive duty incident to the possession of his tenement (v). A way may be expressly granted with the condition of keeping it in repair, or of contributing to the expenses of repairing it, whenever necessary; which would constitute a condition subsequent creating an independent claim, but not affecting the right to use the way. A grant of a way on payment of a fixed sum would constitute the payment a condition precedent to the right (w).

## § 2.—Lights.

Easement of light arising by prescription—by grant—is acquired only for houses and buildings.

Limits of easement-obstruction-building to angle of forty-five degrees-town and country buildings.

Use of light in dominant tenement—unoccupied tenement—conversion of tenement to new use.

Alteration of ancient lights-enlarging ancient lights-additional light from different direction.

The owner of a house or building may make windows Easement of or defined openings for the access of light from the adja- light by prescription. cent land of another, as an ordinary incident of his ownership; and if the light be not obstructed he will acquire by lapse of time the prescriptive easement of having the light

<sup>(</sup>u) 1 Wms. Saund. 322 c, Pomfret y. Rycroft; Coleridge, J., Duncan v. Louch, 6 Q. B. 909; post, p. 280. (v) Stockport Highway Board v.

Grant, 51 L. J. Q. B. 359; Rider v. Smith, 3 T. R. 766; post, p. 280. (w) Duncan v. Louch, 6 Q. B.

continue to pass from the adjacent land without obstruction. The only power the owner of the adjacent land has of preventing the acquisition of such easement is by building upon his own land in a manner to obstruct the light; and this he is entitled to do in his ordinary right as owner to build where and when he pleases, until the adverse right is acquired (a). It is immaterial that he builds, "not to do himself good, but in spite, for the very purpose of darkening his neighbour's windows; as the civilians say, in emulationem vicini" (b). A railway company, holding land exclusively for the purposes of their railway, has the same right to build an obstruction merely for the purpose of preventing an easement over their land (c).

By grant.

The easement of light may also be created and limited by express grant (d). And under certain circumstances the easement may arise as an implied incident in a grant of the dominant tenement. Where the owner of two tenements disposes of one of them, which is so situated as to require for its continued enjoyment as it stands an uninterrupted access of light from the other, such easement is implied to the extent to which it exists in fact at the time of the disposition, though no express grant be made of it in the conveyance of the tenement (e).

Easement of light is acquired for buildings only.

The easement of light can be acquired only as appurtenant to a house or building; it cannot be claimed in respect of open land, so as to prevent the owner of the adjacent land from building upon it (f). The easement is described in the Prescription Act as, "the access and use of light to and for any dwelling house, workshop, or other

<sup>(</sup>a) Tapling v. Jones, 11 H. L. C. 290; 34 L. J. C. P. 342; post, p. 216.

<sup>(</sup>b) Lord Blackburn, Russell v. Watts, L. R. 10 Ap. Ca. 610. (c) Bonner v. Great Western Ry., L. R. 24 C. D. 1.

<sup>(</sup>d) Selborne, L. C., Dallon v. Angus, L. R. 6 Ap. Ca. 794; Lord Blackburn, ib. 823, dissenting from the opinion of Littledale, J., Moore

v. Rawson, 3 B. & C. 340, that the right to light was the subject, not of grant, but of covenant.

<sup>(</sup>e) Leech v. Schweder, L. R. 9 Ch. 463; 43 L. J. C. 487; Russell v. Watts, L. R. 10 Ap. Ca. 590; 55 L. J. C. 158; post, p. 270. (f) Potts v. Smith, L. R. 6 Eq. 318; 38 L. J. C. 58; Roberts v. Macord, 1 M. & Rob. 230.

building, actually enjoyed therewith "(g). A building roofed in but with open sides is not within this description. The easement must be claimed for some certain defined opening; and not for the building generally, to be used sometimes through one opening and sometimes through another at the pleasure of the owner. Accordingly an erection of stages for storing and selling timber, roofed in but with open sides, except when more or less filled up with the timber, was held not to be a building for which the easement could be claimed under the Act (h). The position of the building relatively to the servient tenement, whether at the boundary or at some distance from it, is immaterial, except as affecting the degree of light and the limit of the easement (i).

The limits of the easement in extension over the servient Limits of tenement is regulated by the magnitude and position of the easement over window or opening to which it is appurtenant. "The tenement. aperture which lets the light into the dominant tenement defines the area which must be kept free over the servient tenement" (i). The easement may extend over a servient tenement that is separated from the dominant tenement by a road or other space of land not belonging to the servient owner (k).—As to the degree of obstruction that becomes wrongful it is laid down, "that in order to give a right of action there must be a substantial deprivation of light sufficient to render the occupation of the house uncomfortable, or to prevent the occupier from carrying on his accustomed business on the premises as beneficially as he had formerly done. It is a question of fact and degree in each particular

<sup>(</sup>g) Post, p. 287. (h) Harris v. De Pinna, L. R. 33 C. D. 238; 56 L. J. C. 344.

<sup>(</sup>i) Cross v. Lewis, 2 B. & C. 686. (j) Fry, L. J., Scott v. Pape, L. R. 31 C. D. 554; 55 L. J. C.

<sup>432;</sup> National Provinc. Ass. v. Prudential Ass., L. R. 6 C. D. 757; 46 L. J. C. 871.

<sup>(</sup>k) Birmingham Banking Co. v. Ross, L. R. 38 C. D. 296; 57 L. J. C. 601.

case." And the Prescription Act has made no alteration in this respect (k). "The Court will not interpose upon

every degree of darkening ancient lights and windows. There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained; or an action upon the case; which however might be maintained in many cases which would not support an injunction" (1).—The Metropolitan Local Management Acts impose a statutory rule within the districts to which they apply, that the height of a building in any new street shall not exceed the width of the street. which gives an angle of forty-five degrees from the top of the buildings on one side of the street to the level of the street on the opposite side as the limit of sufficient incidence of light. This rule is sometimes referred to by the Courts as a convenient test of an obstruction under similar circumstances (m). But there is no general rule or presumption of law to the above effect applicable in all cases (n). Nor does the statutory rule apply where the dominant tenement has previously acquired a greater degree of light (o).— There is no different rule of law, as regards the easement and obstruction of light, for buildings in towns and

buildings in the country; although the latter would in general acquire in fact a greater amount of light by reason

of the scarcity of neighbouring buildings (p).

Town and

country

buildings.

Building to angle of

forty-five

degrees.

(k) Brett, L. J., Eccles. Com. v. Kino, L. R. 14 C. D. 224; 49 L. J. C. 529. Per cur. Kelk v. Pearson, L. R. 6 Ch. 811; London Brewery Co. v. Tennant, L. R. 9 Ch. 216; 43 L. J. C. 457.

36 L. J. C. 518. (m) 25 & 26 Vict. c. 102, s. 85; Beadel v. Perry, L. R. 3 Eq. 465;

Haskett v. Baiss, L. R. 20 Eq. 494; 45 L. J. C. 13; Selborne, L. C., London Brewery v. Tennant, L. R. 9 Ch. 220; 43 L. J. C. 457.

(n) Parker v. First Avenue Hotel Co., L. R. 24 C. D. 282; Brett, L. J., Eccles. Commiss. v. Kino, L. R. 14 C. D. 223; 49 L. J. C.

(a) Theed v. Debenham, L. R. 2 C. D. 165. (b) Wood, V.-C., Dent v. Auction Mart, L. R. 2 Eq. 248; 35 L. J. C. 562; explaining Clarke v. Clark, L. R. 1 Ch. 16; 35 L. J. C. 151.

<sup>(1)</sup> Eldon, L. C., Att.-Gen. v. Nichol, 16 Ves. 338, adopted by Wood, V.-C., Dent v. Auction Mart Co., L. R. 2 Eq. 245; 35 L. J. C. 555; and Malins, V.-C., Lanfranchi v. Mackenzie, L. R. 4 Eq. 426;

The easement is not limited by the quantity of light Use of light actually used, or by the purposes for which it is used. on dominant tenement. The use in fact made of the light from time to time is material only so far as it may serve as a practical test of the quantity of light enjoyed, and of any obstruction of it; as in the case of the studio of a sculptor or artist, or a sample room for goods (q). An action may be brought for an obstruction of light in respect of the possible future use of it, although sufficient light be left for the purpose for which it has hitherto been used; and the damages are to be measured by the value of the light for any purpose for which the dominant tenement may reasonably be considered available, at the present time or in the future (r). If the light be obstructed so as to render the premises useless for the owner's trade, it seems that he may recover damages for the expense of removal to other premises (s). -Upon this principle an easement of light may be Unoccupied acquired for a building without any actual use or occu-tenement. pation for any purpose; as was held in the case of a house structurally complete, but internally incomplete and unfit for habitation, and which remained in that state and unoccupied during the whole period of time required to establish the easement (t). And the owner of a house is entitled to the full remedies for an obstruction of the light, whether in damages or by injunction, in respect of the injury to his property, though he does not occupy it or suffer personal discomfort or inconvenience (u).—Upon Conversion the same principle the conversion of a tenement from one of tenement to new use.

<sup>(</sup>q) Lanfranchi v. Mackenzie, L. R. 4 Eq. 421; 36 L. J. C. 518; Yates v. Task, L. R. 1 Ch. 298; 35 L. J. C. 539; Thecd v. Debenham, L. R. 2 C. D. 165.

<sup>(</sup>r) Aynsley v. Glover, L. R. 18 Eq. 544; 44 L. J. C. 523; Moore v. Hall, L. R. 3 Q. B. D. 178; 47 L. J. Q. B. 334. These cases substantially overrule the cases of Martin v. Goble, 1 Camp. 322; Jackson v. Newcastle, 3 D. J. & S.

<sup>275; 33</sup> L. J. C. 698, and *Lanfranchi* v. *Mackenzie*, L. R. 4 Eq. 421; 36 L. J. C. 518; which restricted the right of action to the light in fact used.

<sup>(</sup>s) See The Queen v. Poulter, 56 L. J. Q. B. 581; S. C. 20 L. R. Q. B. D. 132; 57 L. J. Q. B. 138. (t) Courtauld v. Legh, L. R. 4 Ex. 126; 38 L. J. Ex. 45.

<sup>(</sup>u) Wilson v. Townend, 1 Dr. & Sm. 324; 30 L. J. C. 25.

purpose to another, as a dwelling-house into a workshop or conversely, does not affect or qualify the easements of light which were appurtenant to the tenement before the conversion; right of access for light being independent of the purpose to which the light is applied (v). So where a church was pulled down and the site sold for building a warehouse, the lights appurtenant to the church were held to pass for the use of the warehouse (w).

Alterations of lights.

The owner of the dominant tenement may improve the light through an ancient opening, by clearing away mullions and transomes, removing casements, and any other like means, without affecting the existing easement (x). He may alter the form of the opening or he may make a new opening in a plane parallel to the ancient opening, or at an inclination to it; and he will retain the original easement of light so far as it will serve the new opening (y). The identity of the building that receives the light is immaterial, provided the light used in the new building is to a substantial extent the same as that used in the old (z).

Enlarging ancient lights.

But if he enlarge the ancient openings or make a new opening, by which he might in time acquire an enlarged easement, the owner of the servient tenement may obstruct the light through the new or enlarged opening, so far as to prevent the acquisition of any additional easement, provided that he does not at the same time obstruct the ancient light or any part of it. It is no justification of an obstruction of the ancient light that he cannot, without doing so, obstruct the enlarged or new opening (a). Nor

<sup>(</sup>v) Fry, J., National Ins. Co. v. Prudential Ass. Co., L. R. 6 C. D. 764; 46 L. J. C. 871; Cotton, L. J., Scott v. Pape, L. R. 31 C. D. 569; 55 L. J. C. 426.

<sup>(</sup>w) Eccles. Commis. v. Kino, L. R. 14 C. D. 213; 49 L. J. C. 529.

<sup>(</sup>x) Turner v. Spooner, 1 Dr. & Sm. 467; 30 L. J. C. 801.

<sup>(</sup>y) National Ass. Co. v. Pru-dential Ass. Co., L. R. 6 C. D. 757; dential Ass. Co., L. R. 6 C. D. 157; 46 L. J. C. 871; Bullers v. Dick-inson, L. R. 29 C. D. 155; 54 L. J. C. 776; Barnes v. Loach, L. R. 4 Q. B. D. 494; 48 L. J. Q. B. 756. (z) Scott v. Pape, L. R. 31 C. D. 554; 55 L. J. C. 426; post, p. 308. (a) Tapling v. Jones, 11 H. L. C.

is the owner who has thus enlarged his lights bound to restore them to the ancient form and position as a condition of obtaining relief against an obstruction; whether he seeks the legal remedy of damages, or the equitable remedy of an injunction (b). "The principle is perfectly plain, that opening a new window or the enlargement of an old window in the wall of your house is no injury or wrong to your neighbour. It is one of the rights of property which any man is entitled to exercise, and he cannot, by exercising that right, lose any other right which he may have acquired. Therefore, having got a right to the entry of light into a window of a certain size, he does not by making that window larger lose his right to the entry of the light to the old part of it" (c). Upon the same principle if a house be pulled down or destroyed by fire, and a new house be built upon the site with altered or enlarged windows, provided the ancient apertures or any part of them are substantially contained in the new ones, they cannot be obstructed. If the ancient apertures are not substantially preserved in the new house they may be considered as abandoned (d).

The acquisition of additional light from a different Additional direction does not affect or diminish the easement over the light from different servient tenement; the owner of which is not justified in direction. obstructing the easement over his own land, because the dominant owner by purchase or otherwise has obtained light from other land equivalent to the light obstructed (e).

290; 34 L. J. C. P. 342, overruling Renshaw v. Bean, 18 Q. B. 112; 21 L. J. Q. B. 219, and other cases which decided that upon the enlargement of an ancient light, the servient owner might obstruct it wholly, and that the dominant owner had no remedy until he had restored it to the original dimensions. See Newson v. Pender, L. R. 27 C. D. 43.

(b) Staight v. Burn, L. R. 5 Ch. 163; 39 L. J. C. 289; explaining Heath v. Buchnall, L. R. 8 Eq. 1;

38 L. J. C. 372.

(c) Mellish, L. J., Aynsley v. Glover, L. R. 10 Ch. 283; 44 L. J. C. 523.

L. J. C. 523.

(d) Hutchinson v. Copestake, 9
C. B. N. S. 863; Curriers' Co. v.
Corbett, 2 Dr. & S. 355; Newson v.
Pender, L. R. 27 C. D. 43; Bullers
v. Dickinson, L. R. 29 C. D. 155;
54 L. J. C. 776; Scott v. Pape,
L. R. 31 C. D. 554; 55 L. J. C.

(e) Dyers' Co. v. King, L. R. 9 Eq. 438; 39 L. J. C. 339.

Nor can the servient owner justify an obstruction by himself providing an equivalent quantity of light by reflection or other means, without the consent of the dominant owner (y). The dominant owner does not lose his remedies by himself diminishing the light, so far as an obstruction affects the residue (z).

## § 3.—Air.

Distinction of air and light as subject of easement. Easement cannot be claimed for passage of air. Nuisance of pollution of air-nuisance of noise-noxious tradesnuisance of railway-remedy of reversioner. Easement of diffusing noxious vapours and noises.

Distinction of air and light as subject of easement.

It was formerly the practice in actions for obstruction of light, to couple the word "air" with "light" in pleadings and in proceedings of the Court, upon the assumption that air was so connected with light as to be subject to the same rules; but it is now recognised that they are not so inseparably connected. The Courts will not allow the word "air" to be coupled with "light," as a matter of course; nor allow it to be inserted in proceedings of the Court respecting light without a special direction (a). The Court can deal with a pollution of the air on the ground of nuisance; and "this is perhaps the proper ground on which to place the interference of the Court, although in decrees the words "light and air" are often inserted together as if the two things went pari passu." And it is said, "the Court has interfered to prevent the total obstruction of all circulation of air "(b). But "it is only in very rare and special cases, involving danger to

<sup>(</sup>y) Staight v. Burn, L. R. 5 Ch. 163; 39 L. J. C. 289.

<sup>(</sup>z) Staight v. Born, L. R. 5 Ch. 163; 39 L. J. C. 289; Scott v. Pape, L. R. 31 C. D. 554; 55 L. J. C. 426.

<sup>(</sup>a) City Brewery Co. v. Tennant, L. R. 9 Ch. 221; 43 L. J. C. 459; Baxter v. Bower, 44 L. J. C. 625. (b) Wood, V.-C., Dent v. Auction Mart, L. R. 2 Eq. 252; 35 L. J. C. 555; Hall v. Lichfield Brewery, 49 L. J. C. 655.

health, that the Court would be justified in interfering on the ground of diminution of air" (c).

No such easement can be claimed in law as to entitle Easement the owner of land or buildings merely to have the air pass claimed for to or from the adjacent land without obstruction. Such a passage of right is not an ordinary incident of property, as against the ordinary right of the adjacent owner to build as he pleases upon his own land; nor can it be acquired by use or prescription (d). It may be the subject of covenant binding the covenantor personally, and all persons taking the land from him with notice of such a covenant; but it cannot be annexed to the land as a servitude binding a purchaser without notice (e). "There is this difference between the present claim and the claim to light. The right in that case is always limited to the particular window or aperture through which the light has had access; it is one, therefore, against which an adjoining owner can defend himself by blocking it up within the period necessary for the gaining of a right. But here the claim is of such a character that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land "(f).—Accordingly an easement cannot be claimed to have the free passage of air for the working of a windmill; for the reason that the adjacent land owner has no practical means of preventing it, and that the claim is too vague, undefined and extensive to be recognised by law (g). So, a claim cannot be supported for the free access of air to a timber staging or structure used for storing and drying

<sup>(</sup>c) Selborne, L. C., City Brewery Co. v. Tennant, supra. (d) Bryant v. Lefever, L. R. 4 C. P. D. 172; 48 L. J. C. P. 380; Harris v. De Pinna, L. R. 33 C. D. 238; 56 L. J. C. 344. (e) Ante, p. 203; Hall v. Lich-

field Brewery, 49 L. J. C. 655. (f) Bramwell, L. J., Bryant v. Lefever, L. R. 4 C. P. D. 178; 48 L. J. C. P. 383. (g) Webb v. Bird, 13 C. B. N. S. 841; 31 L. J. C. P. 335; ante,

timber, which would in effect prevent building on the adjacent land (h). Upon the same principle no claim can be made by the owner of a house for an obstruction to the draught of the chimney and the escape of smoke, caused by buildings upon the adjacent land. "The right claimed is not one the law allows, being too vague and uncertain; one the acquisition of which the adjoining owner could not defend himself against" (i).

Nuisance by pollution of air.

The owner of land is prima facie entitled to have the air in its natural state, unpolluted by any nuisance emanating from the adjacent land; but in order to give cause of complaint there must be a substantial interference with the reasonable use and enjoyment of the property, having regard to its position and circumstances (i).—The owner of a dwelling-house is entitled to have the air sufficiently pure and unpolluted for the purpose of habitation, and may complain of noxious smells or vapours or infection of disease discharged from the adjacent land. An action lies for keeping pigs so close to a dwelling-house as to pollute the air and render it unwholesome (k); or for carrying on a noxious trade or business, as that of a tallow chandler (l); or that of a brickmaker (m). And an injunction was granted against carrying on a small pox hospital so as to be a nuisance by infection to the adjacent houses (n).—Pollution of air may be actionable for interfering with personal comfort, although not otherwise injurious to health. An injunction was granted against

<sup>(</sup>h) Harris v. De Pinna, L. R. 33 C. D. 238; 56 L. J. C. 344.

<sup>(</sup>i) Bryant v. Lefever, L. R. 4 C. P. D. 178; 48 L. J. C. P. 380. (j) St. Helen's Smelting Co. v.

Tipping, 11 H. L. C. 642; 35 L. J. Q. B. 66; Salvin v. North Brance-peth Coal Co., L. R. 9 Ch. 705; 44 L. J. C. 149.

<sup>(</sup>k) Aldred's Case, 9 Co. 57 b.

<sup>(</sup>l) Bliss v. Hall, 4 Bing. N. C.

<sup>(</sup>m) Walter v. Selfe, 4 De G. & Sm. 315; 20 L. J. C. 434; Cavey v. Lidbetter, 13 C. B. N. S. 470; 32 L. J. C. P. 104.

<sup>(</sup>n) Hill v. Metrop. Asylum, L. R. 4 Q. B. D. 433; 6 Ap. Ca. 193. See Flect v. Metrop. Asylum, Times, 3 Mar. 1886.

the erection of a public urinal so near a dwelling-house as to be a nuisance to the occupiers (o). And nuisances may be dealt with under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 114, although not injurious to health (p).— A nuisance may be actionable by reason of being specially detrimental to a particular manufacture carried on upon the adjacent land (q); or by reason of being specially detrimental to trees and vegetation (r).

The occupier of a dwelling house is also entitled, as an Nuisance of ordinary incident of property, to be free from the disturbance of noises emanating from the adjacent premises; and in case of such noises amounting to a material nuisance incompatible with the comfort of habitation, he would be entitled to relief by an action for damages and for an injunction. "There is no distinction whether it be smoke. smell, noise, vapour or water or any other gas or fluid. The owner of one tenement cannot cause or permit to pass over or flow into his neighbour's tenement any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighbouring tenement, or so as to injure his property" (s). Accordingly an injunction was granted to restrain a nuisance of noise from an iron factory, as well as the nuisance of smoke and noxious effluvia from the factory chimney (t). An action was held maintainable for a nuisance of noise which frightened cattle and disturbed the game upon the plaintiff's land (u). An injunction was granted to restrain public entertainments accompanied with

<sup>(</sup>o) Vernon v. St. James, L. R. 16 C. D. 449; 50 L. J. C. 81; Sellors v. Matlock Local Board, L. R. 14 Q. B. D. 928.

<sup>(</sup>p) Malton Board of Health v. Malton Manure Co., L. R. 4 Ex. D. 302; 49 L. J. M. 90; Bishop Auckland San. Auth. v. Bishop Auckland Iron Co., L. R. 10 Q. B. D. 138; 52 L. J. M. 38.

<sup>(</sup>q) Cooke v. Forbes, L. R. 5 Eq. 166; 37 L. J. C. 178.

<sup>(</sup>r) St. Helen's Co. v. Tipping, 11 H. L. C. 642; 35 L. J. Q. B. 66; Shotts Iron Co. v. Inglis, L. R. 7 Ap. Ca. 518.

<sup>(</sup>s) Romilly, M. R., Crump v. Lambert, L. R. 3 Eq. 413; Selborne, L. C., Gaunt v. Fynney, L. R. 8 Ch. 11; 42 L. J. C 122.

<sup>(</sup>t) Crump v. Lambert, supra. (u) Ibbetson v. Peat, 3 H, & C. 644; 34 L. J. Ex. 118.

the nuisance of music, and fireworks, and disorderly crowds (u). An injunction was granted against ringing a peal of bells in a religious institution, to the annoyance of the neighbours. But in the case of the established church of a parish or parochial district the bells are an appendage recognised by law (v).

Noxious trade.

It is no justification of a nuisance that it is caused by carrying on a lawful business in a proper manner and in a proper place (w); or that similar nuisances already exist at the place (x). The place and circumstances are material only to the question whether the alleged nuisance is to be considered as actionable in relation to the adjacent occupiers. "If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a reasonable way, he has no ground of complaint because to himself individually there may arise much discomfort from the trade carried on in that shop "(y). So, the nuisance of noise is essentially a question of degree and circumstance; it must be exceptive and unreasonable in order to be actionable. In a town the noises arising from the ordinary traffic and from the ordinary use and habitation of houses, such as music, the cries of children, and the entertainment of company, are annoyances without legal remedy (z). But where the ground floor of a house was turned into a stable and horses were fastened up to the party wall, it was held that the noise of the horses became a nuisance that entitled the occupant of the adjoining

<sup>(</sup>u) Walker v. Brewster, L. R. 5 Eq. 25; 37 L.J. C. 33; Inchbald v. Robinson, L. R. 4 Ch. 388. See Jenkins v. Jackson, W. N. 1888, p. 194.

<sup>(</sup>v) Soltau v. De Keld, 2 Sim. N. S. 133.

<sup>(</sup>w) Bamford v. Turnley, 3 B. & S. 62; 31 L. J. Q. B. 286; 8%. Helen's Smelting Co. v. Tipping, 11 H. L. C. 642; 35 L. J. Q. B. 66, overruling Hole v. Barlow, 4 C. B.

N. S. 334; West v. White, L. R. 4 C. D. 635; 46 L. J. C. 333.

<sup>(</sup>x) Crump v. Lambert, L. R. 3 Eq. 413.

<sup>(</sup>y) Chelmsford, L. C., St. Helen's Smelting Co. v. Tipping, supra; Erle, C. J., Cavey v. Lidbetter, 13 C. B. N. S. 470; 32 L. J. C. P. 106.

<sup>(</sup>z) Selborne, L. C., Gaunt v. Fynney, L. R. 8 Ch. 12; 42 L. J. C. 122; Wood, V.-C., Walker v. Brewster, supra.

house to an injunction (a). Upon this principle it is held that the keeping of a school is not necessarily a nuisance to be restrained by the Court, though it may depreciate the adjacent property by causing annoyance; nor is it a breach of a covenant not to do anything that is a "nuisance" to the occupiers of the adjacent property. It is a breach of a covenant not to carry on any trade or business upon the premises; and if the covenant restrained "annoyances" it would be within the covenant if conducted in such a manner as to cause annoyance (b).—Statutory powers are Nuisance of sometimes given for public purposes in exercise of which railway. nuisances are excused so far as they are unavoidable; as in the case of public railway companies using locomotive engines which emit smoke and noise over the neighbourhood; unless they can be charged with negligence in regard to the construction or working of the engines (c). And an injunction was refused against a railway company, to restrain the keeping of cattle and carrying on cattle traffic upon land purchased by them, to the annovance of the neighbourhood by the noise and dirt of the cattle, by reason of their statutory authority to use the land for that purpose (d). The Acts for regulating the use of locomotives upon highways expressly save the right of any person to recover damages for any injury sustained in the use of a locomotive (e).

A reversioner has no cause of action for nuisances to the Reversioner. occupation of demised premises caused by the pollution of air or by noises; because such nuisances are in general merely temporary and may cease before the reversion comes into possession; nor can the intention to continue them be

<sup>(</sup>a) Ball v. Ray, L. R. 8 Ch. 467. (b) Doe v. Keeling, 1 M. & S. 95; Kemp v. Sober, 1 Sim. N. S. 517; Harrison v. Good, L. R. 11 Eq. 338; 40 L. J. C. 294.

<sup>(</sup>c) Hammersmith Ry. v. Brand, L. R. 4 H. L. 171; 38 L. J. Q. B. 265; Vaughan v. Taff Vale Ry., 5 H. & N. 679; 29 L. J. Ex. 297;

Jones v. Festiniog Ry., L. R. 3 Q. B. 733; 37 L. J. Q. B. 214.
(d) London & Brighton Ry. v. Truman, L. R. 11 Ap. Ca. 45; 55 L. J. C. 354.

<sup>(</sup>e) 28 & 29 Vict. c. 83, s. 12; Powell v. Fall, L. R. 5 Q. B. D. 597; 49 L. J. Q. B. 428.

presumed (e). The same principle applies to the reversion of weekly tenancies; for a tenancy from week to week may continue as long as any other tenancy, and a weekly or a yearly tenant has full remedies for a nuisance to his occupation (f).

Easement of diffusing noxious vapours and noises.

Easements, in the proper sense of the word, may be acquired of discharging noxious smells and vapours into the air, and of producing noises, that would otherwise be nuisances to occupiers of adjacent land. They may be acquired, like other easements, by grant or by prescription. lapse of time, if the owner of the servient tenement has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbour" (g). A grant was made of an easement appurtenant to a house of discharging smoke into chimneys in the wall of the adjacent house; and it was held that a purchaser of the servient house had constructive notice of the servitude from the number of chimneys in the wall being in excess of those used for the house (h).

A prescriptive easement of subjecting the servient tenement to what would otherwise be an actionable nuisance can be acquired only where the circumstances are such that the nuisance could be resisted. As to noise, there is no mode of resistance except by action; and in the case of open and unoccupied ground noise is no nuisance and not actionable, and, therefore, the continuance of it will not found an easement. Hence if a new house be built upon the ground the occupier may complain of the nuisance of

<sup>(</sup>e) Simpson v. Savage, 1 C. B. N. S. 347; Mott v. Shootbred, L. R. 20 Eq. 22; 44 L. J. C. 380; Cooper v. Crabtree, L. R. 20 C. D. 589; 51 L. J. C. 189. See House Property Co. v. Horse Nail Co., L. R. 29 C. D. 193; 54 L. J. C. 715.

<sup>(</sup>f) Jones v. Chappell, L. R. 20 (J) Jones V. Cauppeus, L. R. 20 Eq. 539; 44 L. J. C. 658; Inchbald v. Robinson, L. R. 4 Ch. 395. (g) Romilly, M. R., Crump v. Lambert, L. R. 3 Eq. 413.

<sup>(</sup>h) Hervey v. Smith, 22 Beav.

<sup>299.</sup> 

noise, however long it had previously continued (i). Or, the noise may have continued for a long time without annoying the occupier sufficiently to be ground of action, and may have afterwards been increased to a degree constituting an actionable nuisance; from which time only would it avail for founding a prescriptive right (j). So, as to noxious smells, in order to establish a prescriptive right it is not sufficient to prove the continued production of the smell upon the dominant tenement during the period of time required to found a prescriptive title, but it must also be proved that during the same time the smell in fact pervaded the alleged servient tenement in such a manner that the owner might have taken legal proceedings in prevention (k).—No such easements are acquired by mere priority of occupation; nor is it any justification of a nuisance to the adjoining occupier that he voluntarily came to the nuisance, if his tenement had not previously become servient to it (l).

## § 4.—WATER.

Rights of riparian owner in natural stream.

Easement of diverting stream through artificial watercourse—limits of easement—use of the water—maintenance and repair of water-course—liability for non-repair.

Easement of discharging water or other matters—liability for nuisance—exception of natural use of land.

Limits of easement—discharge in excess—maintenance and repair of watercourse—alteration of discharge.

Artificial stream—riparian owners upon artificial streams—permanent artificial streams.

Easement of discharging rain-water from eaves of house.

Water standing upon the surface of land and water Property in diffused through the soil, are presumptively considered in water.

<sup>(</sup>i) Sturges v. Bridgman, L. R. 11 C. D. 852; 48 L. J. C. 785. (j) Ball v. Ray, L. R. 8 Ch. 467.

<sup>(</sup>k) Flight v. Thomas, 10 A. & E.

<sup>(</sup>l) Elliotson v. Feetham, 2 Bing. N. C. 134; Bliss v. Hall, 4 Bing. N. C. 183.

Natural streams.

law, in regard to property, as part of the land itself. Water flowing in defined natural streams is not the subject of property, further than that every riparian owner primâ facie has the right to have it flow on in its natural state, and to have the use of it in passing for limited pur-This right of the riparian owner resembles an easement in some respects; namely, as against the upper riparian owner in requiring him to suffer the water to flow through his land, and in limiting the use of it upon his land; as against the lower riparian owner, in requiring him to suffer the discharge of the water into his land. But it is not an easement properly so called, nor is it treated as an easement in law; it is an ordinary incident of riparian property, and differs from an easement in being appurtenant by nature without a special title of grant or prescription. "The right to have a stream running in its natural course is, not by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is ex jure naturæ; and an incident of property" (a).—Also a right acquired by a riparian owner to divert the water of a natural stream through his own land, though sometimes spoken of as an easement, is not properly so called. It is an act of ownership; and so far as it may be an appropriation of the water, it takes that which was not before the subject of property; it may permanently diminish the stream to the lower tenements, but it does not otherwise render them servient to any use or interference of the upper owner (b).

Easement of diversion of stream.

The diversion of a stream through an artificial watercourse in the land of another is an easement properly so called as regards the watercourse, and may be acquired by grant or prescription. Thus an easement may be acquired

<sup>(</sup>a) Per cur. Dickinson v. Grand Junction Canal, 7 Ex. 299, ante, p. 148.

<sup>(</sup>b) Cockburn, C. J., Mason v. Shrewsbury Ry., L. R. 6 Q. B. 587; 40 L. J. Q. B. 297; ante, p. 151.

by prescription as appurtenant to land, for the occupier to enter upon the adjacent land from time to time as occasion requires to divert the course of a stream for the irrigation of his land (c). So an easement may be acquired as appurtenant to a mill, to have an artificial cut or watercourse through the land of another to divert the water of a stream to the mill (d).—Water mills frequently depend Water mills. upon easements of this kind. The mill is sometimes situated upon the bank of the natural stream, but more usually at some distance from it; the water is conveyed to it by an artificial cut from a weir or dam across the stream, and after working the mill is restored to the natural course. The artificial cut may pass through the land of different landowners in its course from the stream to the mill, and the right to such a watercourse through the land of others is then an easement appurtenant to the mill. Water is frequently conveyed from the natural stream in the same manner for purposes of irrigation (e). Where a riparian owner diverts a natural stream through an artificial watercourse for the use of a mill, and afterwards grants and conveys the mill with the water rights, the mill passes to the grantee with the appurtenant easement of the watercourse through the land of the grantor, and with the incidental riparian rights of the grantor to the flow of the water (f).

The easement of diverting a natural stream through an Limits of artificial watercourse is presumptively defined and limited easement. by the form and capacity of the watercourse in its existing state. The grant of a watercourse may convey merely the easement or right to the flow of water, or it may, if so expressed, convey also the channel or pipe through which the water flows; but presumptively it imparts no right to

Beeston v. Weate, supra. (f) Holker v. Porritt, L. R. 10 Ex. 59; 44 L. J. Ex. 52; ante, (c) Beeston v. Weate, 5 E. & B. 986; 25 L. J. Q. B. 115. (d) Nuttall v. Bracewell, L. B. 2 Ex. 1; 36 L. J. Ex. 1. (e) Nuttall v. Bracewell, supra; p. 152.

enlarge the watercourse or channel so as to carry a greater quantity of water than granted and thereby enlarge the easement (g). Nor, after the grant of a watercourse in a specified channel, can the servient owner make any alteration in the channel in derogation of the easement granted (h).

Use of the water.

This easement is, in general, independent of the use to which the water is applied. A watercourse appurtenant to a mill is independent of the use of the mill, whether it be a grist mill or a fulling mill, or any other kind of mill; the water is claimed for a mill, without any addition of the quality of the mill, and the mill may be used for any purpose at the pleasure of the owner (i). So the owner of a watercourse used for the supply of ponds may alter the position and number of his ponds, without affecting his original right to the water (j). And the owner of a watercourse used hitherto for the supply of cattle-sheds, may apply the water to cottages built in place of the cattle sheds. His right is to have the water flow to his premises, and when it arrives there he may do what he likes with it (k).

Maintenance and repair. The easement of a watercourse impliedly carries with it the right to enter upon the servient tenement to cleanse it so as to maintain the free flow of water; and to repair, when necessary, the structure or channel of the watercourse (l). The servient owner will be restrained from doing anything to obstruct the maintenance and repair; such as building a house over the pipes through which the water flows (m).—The owner of the watercourse, so far as he is entitled to maintain and repair it, is  $prim\hat{a}$  facie responsible for the safety of the water; and in case of an escape of water through his negligence, he would be held liable for the damages (n).

<sup>(</sup>g) Taylor v. St. Helons, L. R. 6 C. D. 264; 46 L. J. C. 857. (h) Northam v. Hurley, 1 E. & B. 665; 22 L. J. Q. B. 183.

<sup>(</sup>i) Luttrell's Case, 4 Co. 86 a, 87 a; Saunders v. Neuman, 1 B. & Ald. 258.

<sup>(</sup>j) Hale v. Oldroyd, 14 M. & W.

<sup>789.
(</sup>k) Watts v. Kelson, L. R. 6 Ch.

<sup>16</sup>è; 40 L. J. C. 126. (l) Pomfret v. Ricroft, 1 Wms. Saund. 323.

 <sup>(</sup>m) Goodhart v. Hyett, L. R. 25
 C. D. 182; 53 L. J. C. 219.
 (n) Fletcher v. Smith, L. R. 2

Easements may be acquired of discharging water, not Easement of being a natural stream, and other materials, into or through water, drainthe land of another; such as the easement commonly ap- age, &c. purtenant to a dwelling-house of draining off refuse water and sewage; the easement of draining land; the easement of discharging water from mines; and of discharging water impregnated with noxious matters from mines and factories. The easement may be claimed of washing away sand and rubble dislodged in the working of mines, and discharging it into a natural stream, to the extent of filling up the bed of the stream and causing an overflow of the water; such claim is within the Prescription Act and may be acquired by use during the statutory period (o).

occupier of land is presumptively bound to keep water, or nuisance. drainage, or any other matters collected upon his own land from flowing or escaping by any means into other land; or into water flowing by or through other land (p); or into water diffused in the soil of other land; so as to cause a nuisance or injury to the occupier of such other land (q). An occupier of land is not justified in discharging a nuisance upon the adjoining land merely because it was wrongfully upon his own; nor is he excused because he was not aware of the nuisance, and was not guilty of any negligence in permitting it (r). Nor is it any justification of a nuisance such as the pollution of a

stream, that it has already been polluted by others to so great an extent as to be unfit for use (s). "The pollution

In the absence of an easement of the above kind the Liability for

Ap. Ca. 781; 47 L. J. Ex. 4, ante, p. 144.
(o) Carlyon v. Lovering, 1 H. & N. 784; 26 L. J. Ex. 251; Wright v. Williams, 1 M. & W. 77.
(p) Tenant v. Goldwin, 2 Ld. Raym. 1089; Wood v. Waud, 3 Ex. 748; Russell v. Shenton, 3 Q. B. 449; Rylands v. Fletcher, L. R. 3 H. L. 338; 37 L. J. Ex. 161; Evans v. Manchester & Sheffield Ry. Co., L. R. 36 C. D. 631. p. 144.

<sup>(</sup>q) Hodgkinson v. Ennor, 4 B. & S. 229; 32 L. J. Q. B. 231; Snow v. Whitehead, L. R. 27 C. D. 588; 53 L. J. C. 885; Ballard v. Tomlinson, L. R. 29 C. D. 115; 54 L. J.

<sup>70. 454.</sup> See ante, p. 143.
(r) Humphries v. Cousins, L. R.
2 C. P. D. 239; 46 L. J. C. P. 438.
(s) Wood v. Waud, 3 Ex. 772; Crossley v. Lightowler, L. R. 2 Ch. 478; 36 L. J. C. 584.

of a stream already made foul and useless by other pollutions is an injury without damage; which would, however, at once become both injury and damage on the cessation of other pollutions." It is therefore restrained by injunction (t).

Natural use of land.

Mining.

"But the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural use by his neighbour of his land" (u). "Where the maxim sic utere tuo ut alienum non lædas is applied to landed property it is necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land" (v).—The natural use of mineral land is the excavating and raising of minerals; hence the owner is entitled to work the minerals without incurring any liability for the flow or percolation of water into other land caused by natural gravitation in the course of working; provided he works in a usual, proper and careful manner. But he is liable if he has raised the water by pumping to a higher level in order to discharge it; or if he has otherwise artificially moved or collected the water and thereby caused the flow; the lower mine being presumptively free from any servitude of receiving water conducted artificially from the higher mine (w). The exercise of a trade is an adventitious and not a natural use of land; and therefore it is no justification of the pollution of a stream that it was done in the exercise of a lawful trade carried on in a reasonable and proper manner and in a proper place (x).

<sup>(</sup>t) Fry, J., Pennington v. Brinsop Hall Coal Co., L. R. 5 C. D. 772; 46 L. J. C. 773.

<sup>(</sup>u) Por cur. Hurdman v. North Eastern Ry., L. R. 3 C. P. D. 174; 47 L. J. C. P. 368; Rylands v. Fletcher, L. R. 3 H. L. 338; 37 L. J. Ex. 161.

<sup>(</sup>v) Brett, L. J., West Cumberland Iron Co. v. Kenyon, L. R. 11

C. D. 787; 48 L. J. C. 796. See

post, p. 237.
(w) Smith v. Kenrick, 7 C. B. 515; Baird v. Williamson, 15 C. B. N. S. 376; 33 L. J. C. P. 101; Wilson v. Waddell, L. R. 2 Ap. Ca. 95; Fletcher v. Smith, L. R. 2 Ap. Ca. 781; S. C. Smith v. Musgrave, 47 L. J. Ex. 4.

<sup>(</sup>x) Stockport Waterworks v. Potter,

An easement of discharge is limited and defined by the Limits of terms of the grant, or by the prescriptive use on which it is easement. founded. A grant of a watercourse or drain through the land of the grantor is presumptively limited to the reasonable service of the dominant tenement in its then state and condition; a drain for the use of a certain dwelling-house cannot be used for another dwelling-house; or for large additional buildings, as where an ordinary dwelling-house was enlarged into a lunatic asylum for a great number of patients (y). The reservation in a building lease of "the free running of water and soil coming from any other buildings and lands through the sewers and watercourses under the said premises," was construed to include only water and the products of the ordinary use of land for habitation; so that the lessor could not use the contiguous land for a manufacture and discharge the refuse through the sewers (z). Upon the same principle a prescriptive right of discharging the ordinary refuse water from a house does not justify the discharge of sewage (a). An easement of discharging noxious products of a manufacture into a stream does not justify a change in the process of manufacture which has the effect of casting a different or greater burden upon the servient tenement than that established by use (b); but it extends to all new products that may from time to time be reasonable and proper for the manufacture that do not increase to any substantial or tangible degree the amount of pollution (c). —If the discharge is in excess of the easement in quantity, Discharge in quality, or direction, and the owner of the servient easement. tenement cannot by other means prevent the excess, he may stop the discharge altogether, and the owner of the

7 H. & N. 160; 31 L. J. Ex. 9; ante, p. 222.

(a) Cawkwell v. Russell, 26 L. J.

<sup>(</sup>y) Wood v. Saunders, L. R. 10 Ch. 582; 44 L. J. C. 514; James, L. J. Metropol. Board v. London & N. W. Ry., L. R. 17 C. D. 249; 50 L. J. C. 410.

<sup>(</sup>z) Chadwick v. Marsden, L. R. 2 Ex. 285; 36 L. J. Ex. 177.

<sup>(</sup>b) Stockport Waterworks v. Potter, 7 H. & N. 160; 31 L. J. Ex. 9. See Clarke v. Somerset Commiss., 57 L. J. M. 96.

<sup>(</sup>c) Baxendale v. M'Murray, L. R.

dominant tenement can have no remedy for the obstruction of the easement until he reduces its exercise within the rightful limits. "If a man has a right to send clean water through a drain, and chooses to send dirty water, every particle of the water ought to be stopped, because it is all dirty" (d). But if other parties have rights through the same drain who are not acting in excess of their rights, it cannot be stopped as against them; the only remedy then is by an action against the party who exceeds his right (e).

Maintenance and repair of watercourse.

Alteration of discharge.

The owner of the dominant tenement is entitled to enter upon the servient tenement for the purpose of cleaning and repairing the channel or watercourse, and of doing all things necessary for that purpose; he may do whatever may be reasonably required for the effectual enjoyment of the easement (f).—He is not entitled to alter the course of the discharge; and he is liable for an escape or discharge of the water or other material in any other direction or in any other channel (g). Nor is he entitled to alter the level or enlarge the channel so as to increase the flow of the water; or in any way to aggravate the servitude of the lower tenement (h). But he may alter the level of a drain or watercourse if necessary to maintain it in an efficient state; and where a local authority had altered the level of the outlet sewer, he was held entitled to lower the servient drains to the new level (i).

Artificial streams.

The discharge of an artificial stream of water may be beneficial to the lower riparian owners; but though it be so, and though they have used and enjoyed it for a length of time sufficient to found a prescriptive title, they do not

<sup>(</sup>d) Alderson, B., Cawkwell v. Russell, 26 L. J. Ex. 34; Charles v. Finchley Board, L. R. 23 C. D. 767; 52 L. J. C. 554.
(e) Jessel, M. R., Att.-Gen. v. Dorking, L. R. 20 C. D. 595; 51 L. J. C. 585.

<sup>(</sup>f) 11 Co. 52 a, Liford's Case; Hodgson v. Field, 7 East, 613.

<sup>(</sup>g) Humphries v. Cousins, L. R. 2 C. P. D. 239; 46 L. J. C. P. 438. (h) Frechette v. St. Hyacinthe Co., L. R. 9 Ap. Ca. 170; Taylor v. St. Helens, L. R. 6 C. D. 264; 46 L. J.

<sup>(</sup>i) Finlinson v. Porter, L. R. 10Q. B. 188; 44 L. J. Q B. 56.

thereby acquire any right to its continuance. For it is a general principle of the law of easements "that an easement exists for the benefit of the dominant owner alone. and that the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment" (j). "The enjoyment of the easement is of itself no evidence that the party enjoying it has become subject to the servitude of being bound to exercise it for the benefit of the neighbour" (k). Thus an easement of discharging an artificial stream of water produced in draining a mine, depending entirely upon the mining operations, may be abandoned by the dominant owner at any time; and the servient owner, though in course of time he may have become subject to the burden of the flow of the water. can make no claim to the benefit of its continuance (1). So the drainage of agricultural land may be diverted and disposed of from time to time in whatever way may be accessible to the dominant owner, without incurring any liability for discontinuing it through the servient tenement (m). So where a canal company who had for many years discharged waste water into another canal, to the benefit of the latter by increasing the supply of water, by making certain improvements stopped the discharge of waste water into the servient canal; it was held that the latter could not claim a prescriptive right to the continuance of the supply, because it had been enjoyed by sufferance only and not of right (n).

Upon the same principle where an artificial stream dis-Riparian charges through several properties, each riparian owner in owners. turn, though he may have incurred the charge of receiving

<sup>(</sup>j) Cockburn, C. J., Mason v. Shrewsbury Ry. Co., L. R. 6 Q. B. 587; 40 L. J. Q. B. 298.
(k) Per our. Gaved v. Martyn, 19 C. B. N. S. 732; 34 L. J. C. P. 363.
(l) Wood v. Waud, 3 Ex. 748; Arkwright v. Gell, 5 M. & W. 231; Gaved v. Martyn, 19 C. B. N. S. 732; 34 L. J. C. P. 363.

<sup>(</sup>m) Per cur. Wood v. Waud, 3 Ex. 778; Greatrex v. Hayward, 8 Ex. 291; 22 L. J. Ex. 137; Sampson v. Hoddinott, 1 C. B. N. S. 590; 26 L. J. C. P. 148.

<sup>(</sup>n) Staffordshire and Worcester Canal v. Birmingham Canal, L. R. 1 H. L. 254; 35 L. J. C. 757.

the water, and may have acquired the right of discharging it, is not therefore obliged to continue the discharge. is primâ facie entitled to stop the water, wholly or in part, for use upon his own land. "Each may take and use what passes through his land, and the proprietor of the land below has no right to any part of the water until it has reached his own land. He has no right to compel the owners above to permit the water to flow through their land for his benefit; and consequently he has no right of action if they refuse to do so (o)." But so long as the owners of the land above suffer the water to pass, they are bound to discharge it in the accustomed course and condition, without alteration or pollution, as if it were a natural stream (p).—But where a permanent natural stream or source of water is diverted through an artificial channel, the owners of the tenements through which it flows may acquire prescriptive rights to the permanent continuance of the artificial stream; and in such case the rights of riparian owners become presumptively the same as in the case of a natural stream (q). So, if a permanent system of collecting and distributing water for the service of a district be found existing from beyond the memory of man, it may be presumed in favour of existing rights to have had a legal origin, upon which the respective rights and liabilities of the riparian owners are based (r).

Permanent artificial streams.

Discharging , rain-water from eaves of house.

Amongst the easements of discharging water into land of another may be included that of discharging rain water from the projecting eaves of a house or building, called in the civil law, jus stillicidia immittendi. In the absence of an easement to that effect, the building of eaves or gutters

Pattuk, L. R. 4 Ap. Ca. 121.

<sup>(</sup>o) Per cur. Wood v. Waud, 3 Ex. 779; Blackburn, J., Mason v. Shrewsbury Ry. Co., L. R. 6 Q. B. 584; 40 L. J. Q. B. 296. (p) Magor v. Chadwick, 11 A. & E. 571; Sutcliffe v. Booth, 32 L. J.

Q. B. 136.

<sup>(</sup>q) Sutcliffe v. Booth, supra; Gaved v. Martyn, 19 C. B. N. S. 732; 34 L. J. C. P. 353; Ivimey v. Stocker, L. R. 1 Ch. 396; 35 L. J. C. 467; Roberts v. Richards, 50 L. J. C. 297. (r) Rameshur Singh v. Koon

projecting over the land of another for the discharge of rain water is primâ facie an actionable nuisance; and according to the presumption embodied in the maxim cujus est solum ejus est usque ad cælum, it is an act of trespass to the possession of the occupier (s). It may also be injurious to the reversion of premises under demise, and entitle the landlord or reversioner to maintain an action; who in such case may bring repeated actions for continuing the nuisance, and may claim an injunction to restrain it (t).—The owner of a house or building may receive the rain water upon the roof and discharge it through gutters and pipes in a collected stream upon his own land, whence it may percolate naturally into the adjacent land; provided he does not thereby cause it to pass in a materially different way or in a greater quantity than is natural, so as to be a nuisance to the owner (u).—In rebuilding a house the owner may retain the easement of discharging the rain water from the projecting eaves; and a slight excess in the height of the new eaves was considered to be immaterial, where no greater burden was thereby thrown upon the servient tenement (v).

<sup>(</sup>s) Baten's Case, 9 Co. 53 b; Pen-ruddock's Case, 5 Co. 100 b; Fay v. Prentice, 1 C. B. 828; Cotton, L. J., Harris v. De Pinna, L. R. 33 C. D. 260; 56 L. J. C. 348.

<sup>(</sup>t) Tucker v. Newman, 11 A. & E. 40; Bathishill v. Reed, 18 C. B. 696; 25 L. J. C. P. 290. (u) James, L. J., West Cumber-

land Iron Co. v. Kenyon, L. R. 11 C. D. 786; 48 L. J. C. 793; per cur. Hurdman v. North Eastern Ry. Co., L. R. 3 C. P. D. 173; 47 L. J. C. P. 368; Broder v. Saillard, L. R. 2 C. D. 692; 45 L. J. C. 414.

<sup>(</sup>v) Thomas v. Thomas, 2 C. M. & R. 35; Harvey v. Walters, L. R. 8 C. P. 162; 42 L. J. C. P. 105.

## § 5.—Support.

Easement of support of surface by subjacent land—presumption of easement upon severance of surface.

Grant of easement of support—construction of grants and reservations of minerals—mining leases—minerals under railways.

Extent of easement—substitution of artificial support.

Support by adjacent tenement—implied upon severance of tenements—extent of easement—artificial support.

Support of building by subjacent and adjacent land—by grant—by prescription—extent of support—injury by disturbance of support of building.

Support of building by adjoining building—implied grant—prescription—repair of servient building—injury from adjoining building. Support of upper story of house—repair of roof.

Easement of support by subjacent land.

The right of support for the surface of land from the subjacent land, where they are held as separate tenements, is an easement; which may be created by grant, express or implied, upon the severance of the tenements. "The right is properly called an easement; though when the land is in its natural state the easement is natural and not conventional. Using the language of the law of easements, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which by the servient tenement is necessary for the safety and stability of the dominant" (a).

Presumption of easement upon severance of surface. Where there is no deed or evidence of the original severance of the substratum or minerals, the presumption arises that it took place in a manner which would confer upon the owner of the surface a right of support. "If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and if he is supposed to have alienated the minerals, reserving the surface, he cannot be

<sup>(</sup>a) Selborne, L. C., Dalton v. Angus, L. R. 6 Ap. Ca. 792; 50 L. J. Q. B. 730.

presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed" (b). Hence the easement of support appears as "of common right," that is, "where it is established that the upper and lower strata are in different hands it is not necessary in pleading to allege, or in evidence to prove, any special origin for it, the burden both in pleading and proof · is on those who assert that the rights are different "(c). —The right of support is also sometimes referred to the maxim, sic utere tuo ut alienum non lædas (d).

Support of the surface may be the subject of express grant Grant of or stipulation in the deed of severance; as is generally the support. case in sales and leases of mines and minerals. titles may show that the surface is held on the terms that the owner of the minerals is at liberty to remove the whole of them without leaving any support to the surface; either, according as may be stipulated, without making any compensation for the damage thus occasioned; or having the right to remove the support, but being bound to make compensation for the damage done by exercising that right. It is, in every case, a question of construction of the deeds. to ascertain whether the intention so to contract appears on the titles" (e). The general rule or presumption that the surface owner is entitled to support "is not confined to the case where the Court has not before it the instrument under which the owner of the minerals derives his rights;

<sup>(</sup>b) Per cur. Humphries v. Brogden, 12 Q. B. 746.

<sup>(</sup>c) L. Blackburn, Dixon v. White,

L. R. 8 Ap. Ca. 842. (d) L. Chelmsford, Duke of Buccleuch v. Wakefield, L. R. 4 H. L. 406; Selborne, L. C., Dalton v. Angus, L. R. 6 Ap. Ca. 791. But it is justly observed that this maxim, like all maxims, "is mere verbiage. A party may damage the property of another where the law permits, and he may not where the law prohibits, so that the

maxim can never be applied till the law is ascertained, and when it is the maxim is superfluous." Erle, J., Bonomi v. Backhouse, 27 L. J. Q. B. 388. Brett, L. J., West\_Cumberland Iron Co. v. Kenyon, L. R. 11 C. D. 787; 48 L. J. C.

<sup>796;</sup> ante, p. 230.
(e) Lord Blackburn, Dixon v. White, L. R. 8 Ap. Ca. 843; Rowbotham v. Wilson, 8 H. L. C. 348; 30 L. J. Q. B. 49; Buccleuch v. Wakefield, L. R. 4 H. L. 377; 39 L. J. C. 441.

but it also applies to cases where the Court has the instrument before it, for the purpose of construing the instrument, to this extent, that prima facie the right to support exists, and the burden lies on the owner of the minerals to show that the instrument gives him authority to destroy what is described by the judges as the inherent right of a person who owns the surface apart from the minerals" (f).

Construction of grants and reservations of minerals.

Accordingly, under a grant of land, reserving minerals with liberty to search for and get them, "making a fair compensation for the damage done to the surface," it was held that the reservation included only so much of the minerals as could be got leaving a reasonable support to the surface; the provision for compensation being construed to apply only to the liberty of searching for and getting the minerals and the ordinary surface damage done in exercising it (g). Under a similar grant of the surface reserving the minerals, "with liberty of ingress and regress to dig and search for and take the excepted minerals;" it was held that the deed gave no power to work surface minerals to the destruction of the surface, though they could not be worked otherwise; the liberty reserved being construed to justify only such damage as might occur in getting minerals below the surface (h). A clause in an Inclosure Act providing that the person working the mines should make satisfaction for the damage of the ground to the person in possession, not to exceed a certain sum yearly during the working for every acre, was construed to apply only to temporary damage to the occupier, and not to affect the presumptive right of support for the surface, which was implied in the ownership (i).—On the other hand where by an Inclosure Act surface land was

<sup>(</sup>f) Mellish, L. J., *Hext* v. *Gill*, L. R. 7 Ch. 714; 41 L. J. C. 761; Dugdale v. Robertson, 3 K. & J. 695; Lord Blackburn, Dixon v. White, L. R. 8 Ap. Ca. 843; Selborne, L. C., Love v. Bell, L. R. 9 Ap. Ca. 288; 53 L. J. Q. B. 257.

<sup>(</sup>g) Harris v. Ryding, 5 M. & W. (g) Harris V. Ryanig, 5 M. & W. 60; Smart v. Morton, 5 E. & B. 30; 24 L. J. Q. B. 261; Dixon v. White, L. R. 8 Ap. Ca. 833.
(h) Hext v. Gill, L. R. 7 Ch. 699; 41 L. J. C. 761.
(i) Love v. Bell, L. R. 9 Ap. Ca. 286; 53 L. J. Q. B. 257.

allotted to one person and the mines to another, and the award contained a covenant that the mines should be worked by the allottee, without being subject to any action by reason of the surface of the land being rendered less commodious by sinking, or being otherwise defaced and injured: it was held that the owner of the surface had no claim for surface damage caused by mining, unless caused by wilfulness or negligence (j). Where the waste of a manor was inclosed and allotted, with reservation to the lord of the manor of all mines lying under the waste, with liberty of searching for, winning, and working the same, "and that without making or paying any satisfaction for so doing"; and it was provided that compensation for damage to any person's allotment by such working of the mines should be paid by the occupiers of the other allotments; it was held that the Act gave to the lord of the manor the right to let down the surface by mining without making any compensation (k). But where an Inclosure Act, reserving similar absolute rights of mining to the lord, set out certain highways over the land for the use of the public; it was held that the highways were excepted from the general right of the lord to let down the surface by mining (1). Where a plot of land was granted for building, reserving all minerals under the land, with power to take them at pleasure, "but without entering upon the surface, so that compensation in money be made for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties"; it was held upon the construction of the deed that the grantor was entitled to take all the minerals without leaving any support, subject only to compensation for damage (m).

Ch. 394; 44 L. J. C. 359.

<sup>(</sup>j) Rowbotham v. Wilson, 8 H.
L. C. 359; 30 L. J. Q. B. 49.
(k) Gill v. Dickinson, L. R. 5
Q. B. D. 159; 49 L. J. Q. B. 262;
Buchanan v. Andrew, L. R. 2 Sc. Ap. 286.

<sup>(</sup>l) Benfieldside v. Consett Iron Co., L. R. 3 Ex. D. 54; 47 L. J. Ex. 491. (m) Aspden v. Seddon, L. R. 10

Mining lease

In mining leases, the object of which is the sale and removal of the minerals which form the natural support of the surface, the extent and mode of working out the minerals and consequently the right of support are in general specially regulated by the terms of the lease (n). If the lease is silent or uncertain about the support for the surface, a right of support is presumed as a basis of the lease and of the construction of its terms; the right of support exists unless it is taken away (o). "If the terms of the lease are that the lessee should work in a specified manner, leaving certain described supports, then if the lessee works in that manner he would not be responsible if the surface subsided in consequence; and the same would be the conclusion if the covenant was that he should work according to the usual mode of working coal mines in the district" (p). Where a lease of minerals expressly stipulated for compensation to the lessor for the damage he might sustain by injury done to the land in getting the minerals and to the dwelling-houses and other buildings of the lessor, which the lessee covenanted to pay in a specified manner; it was held that the lease contemplated such damage being done, and gave the lessee the absolute power of working without leaving support, subject only to the payment under his covenant (q). But where a lease gave certain powers of working the minerals and stipulated for compensation for any damage done to the surface, it was held that the provision for compensation applied only to the exercise of the given powers, and did not enlarge the power of working so as to let down the surface (r). lease of an upper stratum of minerals reserving the underlying strata, if the lease is silent or doubtful as to

<sup>(</sup>n) Per cur. Eadon v. Jeffcock, L. R. 7 Ex. 388; 42 L. J. Ex. 36. (o) Lord Blackburn, Davis v. Treharne, L. R. 6 Ap. Ca. 467; 50 L. J. Q. B. 665; Mundy v. Rutland, L. R. 23 C. D. 81.

<sup>(</sup>p) Per cur. Eadon v. Jeffcock, L. R. 7 Ex. 389; 42 L. J. Ex. 36;

Taylor v. Shafto, 8 B. & S. 228.
(q) Smith v. Darley, L. R. 7 Q.
B. 716; 42 L. J. Q. B. 140. See
Aspden v. Seddon, L. R. 1 Ex. D.
496; 46 L. J. Ex. 353; cited ante,
p. 239.
(r) Davis v. Treharne, L. R. 6
Ap. Ca. 460; 50 L. J. Q. B. 665.

the support of the demised minerals, there is presumed the right to have such support as is necessary to render the lease effective (s).

Where land is compulsorily taken by a railway com- Minerals pany under the powers of the Railway Clauses Act, 1845, under railways. 8 & 9 Vict. c. 20, the minerals are excepted from the conveyance unless expressly named and conveyed therein. By ss. 78, 79, the owner is required to give thirty days' notice of his intention to work them, and if the company decline to pay compensation within that time he is at liberty to do so, "so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district; and if any damage or obstruction be occasioned to the railway by improper working, the same shall be repaired or removed, and such damage made good by the owner, lessee, or occupier of such minerals at his own expense." The company has no protection for the railway and works except that given by the Act; and the owner of the minerals working them in the usual and proper manner as required by the Act is not liable for surface damage caused by such working (t). A purchaser from the railway company of land so acquired and re-sold as superfluous land, has no greater rights than the company and can make no claim for surface damage caused by working in a proper and usual manner, either against the original owner of the minerals or his lessee, and though the latter might be bound by his lease to leave a proper support (u).—Conveyances of land to railway companies authorised under special Acts which require the minerals to be reserved to the landowner, but do not incorporate the Railway Clauses Act, 1845, are subject to the same construction as voluntary conveyances; and the company

<sup>(</sup>s) Mundy v. Duke of Rutland, L. R. 23 C. D. 81.

<sup>(</sup>t) Fletcher v. Great Western Ry., 5 H. & N. 689; 29 L. J. Ex. 253; Great Western Ry. v. Bennett, L. R.

<sup>2</sup> H. L. 27; 36 L. J. Q. B. 133; Midland Ry. v. Robinson, 57 L. J. C. 441; ante, p. 65.

<sup>(</sup>u) Pountney v. Clayton, 52 L. J. Q. B. 566; L. R. 11 Q. B. D. 820.

as surface owners are presumptively entitled to the ordinary right of support from the minerals reserved (v).

Extent of easement.

As to the degree of support it is said, "the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level." It is independent of the nature of the soil and of the comparative values of the surface and the minerals; and it may be claimed though the minerals cannot be worked at all without injuring the surface, to the exclusion of all beneficial property in them, unless the parties come to some agreement for working (w).—But it does not include the additional support of water diffused in the soil, so as to prevent the servient owner from draining his land for mining or other purposes; unless the subjacent water is made the subject of express grant or agreement (x). And compensation for surface damage does not extend to loss of surface water and springs withdrawn by ordinary mining operations (y).

Substitution of artificial support.

The right of support does not consist in having the substratum and minerals, or a portion of them, left in their natural state. The right is only to have and enjoy the surface supported in its natural state; and the servient owner may take away all the subsoil and minerals, provided he substitute some other sufficient support. Accordingly there is no injury or cause of action in the mere removal of the substratum, unless and until it produces a subsidence of the surface; and consequently the Statute of Limitations begins to run from the latter event and not from the former. If after removal of the substratum an

<sup>(</sup>v) Caledonian Ry. v. Sprot, 2 Macq. 449; Elliot v. North Eastern Ry., 10 H. L. C. 333; 32 L. J. C. 402; and see as to Canal Acts, Lancash. & Yorksh. Ry. v. Knowles, L. R. 20 Q. B. D. 391.

<sup>(</sup>w) Per cur. Humphries v. Brogden, 12 Q. B. 745; Hext v. Gill, L. R. 7 Ch. 699; 41 L. J. C. 761.

<sup>(</sup>x) Elliot v. North Eastern Ry., 10 H. L. C. 333; 32 L. J. C. 402; Popplewell v. Hodkinson, L. R. 4 Ex. 248; 38 L. J. Ex. 126; ante, p. 143.

<sup>(</sup>y) Ballacorkish Mining Co. v. Harrison, L. R. 5 P. C. 64; 43 L. J. P. C. 19.

artificial substitute is provided in time to prevent any subsidence, there is no injury or cause of action (z). Consequently, every subsidence caused by the removal of the substratum creates a new cause of action, and successive actions may be brought for successive subsidences, though arising from the same removal of substratum, which actions will date, as regards the Statute of Limitations, from the times of the subsidence and not from the original removal of substratum; the cause of action being, not in the act of removal, but in the damage caused thereby (a).

The owners of adjacent tenements are presumptively en- Support by titled, each to such support from the other, as will preserve adjacent ment. the tenements in their natural state. "It is not necessary either in pleading to allege, or in evidence to prove, any special origin for the right; the burthen, both in pleading and in proof, is on those who deny its existence in the particular case." This right of lateral support from the adjacent tenement, in regard to the benefit to the dominant tenement and the restriction upon the use of the servient tenement, is properly called an easement (b).

Upon the severance of two tenements by conveyance Implied upon this easement of support is implied as appurtenant to each severance of tenements. tenement, in the absence of any provision or intention expressed to the contrary. But if land be sold for some special purpose requiring excavation, as for building in a certain manner, it would to that extent be discharged of the easement of support as against the adjacent tene-

ment of the vendor, who could only complain of excessive excavation beyond that authorized (c).—The same

(z) Bonomi v. Backhouse, E. B. & E. 622; 28 L. J. Q. B. 378; Back-house v. Bonomi, 9 H. L. C. 503; 34 L. J. Q. B. 181.

(a) Darley Main Coll. v. Mitchell,
 L. R. 11 Ap. Cas. 127; 55 L. J. Q.

B. 529; overruling *Lamb* v. *Walker*, L. R. 3 Q. B. D. 389; 47 L. J. Q. B.

(c) Murchie v. Black, 19 C. B.

<sup>(</sup>b) Selborne, L. C., Dalton v. Angus, L. R. 6 Ap. Ca. 792; Lord Blackburn, ib. 809; James, L. J., Birmingham v. Allen, L. R. 6 C. D.

principle applies to the compulsory purchase of land under the statutory powers of railway and other companies, unless the statute expressly limits and defines the extent of support to the railway or works, as is done in the Railway Clauses Act, 1845. "Whether voluntary or compulsory every grant must carry with it all that is necessary to the enjoyment of the subject-matter of it, and therefore if a certain amount of lateral support is essential to the safety of the railway, the right to it must pass as a necessary incident to the grant" (d).

Extent of easement.

The easement presumptively extends over so much of the adjacent land as is necessary in its natural state to support the dominant tenement in its natural state. It may extend over several tenements held in separate ownership; but it is not enlarged against a more remote tenement by reason of the owner of an intermediate tenement removing a part of the support, so as to throw a greater burden upon the land beyond (e). Nor is it enlarged by the owner of the dominant tenement removing the subjacent support of the surface, so as to increase the lateral support from the adjacent land (f).—The easement does not extend to the prevention of the servient owner from draining his land in a proper manner, though the consequence may be to withdraw the water from the adjacent soil and cause a subsidence of the surface (g).

Substitution of artificial support.

This easement, like that of subjacent support, "is not a right to have the adjoining soil remain in its natural state (which right if it existed would be infringed as soon as any excavation was made in it); but a right to have the benefit of support, which is infringed as soon as, and not

N. S. 190; 34 L. J. C. P. 337; Rigby v. Bennett, L. R. 21 C. D. 559.

<sup>(</sup>d) Lord Chelmsford, Elliot v. North Eastern Ry., 32 L. J. C. 408; 10 H. L. C. 333; North Eastern Ry. v. Crossland, 2 J. & H. 565; 32 L. J. C. 353; ante, p. 242.

<sup>(</sup>e) Birmingham v. Allen, L. R. 6 C. D. 284; 46 L. J. C. 673; Elliot v. North Eastern Ry., 10 H. L. C. 333; 32 L. J. C. 402. (f) Partridge v. Scott 3 M. & W.

<sup>(</sup>f) Partridge v. Scott, 3 M. & W. 220.

<sup>(</sup>g) Popplewell v. Hodkinson, L. R. 4 Ex. 248; 38 L. J. Ex. 126; ante, p. 242.

till, damage is sustained in consequence of the withdrawal of that support" (h). "The taking away the soil is not in se wrongful. It only becomes so when followed by injurious consequences to the neighbour; and if, therefore, such injurious consequences can be averted by efficient means, as by the substitution of artificial for the natural support previously afforded by the soil, the removal of the soil is in no respect wrongful" (i).

The easement of support presumptively incident to land Support of from the subjacent and adjacent tenements is limited to subjacent and the land in its natural state, and does not extend to the adjacent land. additional weight of buildings placed upon the land (j). But an easement of support for houses and buildings as against the owner of the subjacent and adjacent land, to a distance sufficient to support the buildings, may be acquired by a special title of grant or prescription. "The right to support of land and the right to support of buildings stand upon different footings, as to the mode of acquiring them; the former being primâ facie a right of property, analogous to a right to the flow of a natural river or of air, though there may be cases in which it would be sustained as matter of grant; whilst the latter must be founded upon prescription or grant, express or implied; but the character of the rights when acquired is in each case the same "(k). As against a stranger, showing no right in the adjacent land, and therefore, primâ facie a wrongdoer, the owner of a house might claim damages for a disturbance of the support upon his mere possessory title; for "if a house is de facto supported by the soil of a neighbour, this appears sufficient title against anyone but that neighbour, or one

<sup>(</sup>h) Lord Blackburn, Dalton v. Angus, L. R. 6 Ap. Ca. 808, citing Backhouse v. Bonomi, 9 H. L. C.

<sup>503;</sup> ante, p. 242. (i) Per cur. Bower v. Peate, L. R. 1 Q. B. D. 325; 45 L. J. Q. B.

<sup>(</sup>j) Wyatt v. Harrison, S B. &

Ad. 871; Partridge v. Scott, 3 M. &

M. 220; Gayford v. Nicholds, 9 Ex. 702; 23 L. J. Ex. 205.

(k) Per cur. Bonomi v. Backhouse, E. B. & E. 655; 28 L. J. Q. B. 380; Selborne, L. C., Angus v. Dalton, L. R. 6 Ap. Ca. 792; Lord Blackburn, ib. 809.

claiming under him. Against a person having the right to the adjoining soil, it would be necessary to show a title to the support of the soil "(1).

Support of building by grant.

"Where the case is not that of two independent landowners, but of the owner of two closes conveying one of those closes to another person, there he can do nothing derogating from his own grant; and if he has conveyed it for the express purpose of having buildings erected upon it, he then enters into an implied contract that he will do nothing to his soil which will prevent the soil he granted being able to serve the purpose for which, to his own knowledge, he has conveyed it; and the person who has acquired the soil under these circumstances has the additional right of having support for the buildings, or for whatever else may be the object for which he has purchased the soil" (m). This implied grant of support for buildings may be modified by express provisions regarding it; and it may be modified or restricted by circumstances known both to the grantor and the grantee at the time of the grant; as where it is known to the grantee that the grantor reserves the servient tenement for purposes which may affect the support of the adjacent buildings. Where land was sold in lots for building according to a general plan, it was held that each lot carried with it the right of excavating according to the plan, subjecting the right of support to such excavation; so that the purchaser of each lot could only complain of excess or deviation from the general plan (n). Where statutory authority is given to construct works in or upon land, the right of support for such works is in general impliedly given, subject to the express provisions of the Acts as to compensation to the

<sup>(1)</sup> Jeffries v. Williams, 5 Ex.

<sup>(1)</sup> Jeffries V. Williams, 5 Lex. 800; Bibby v. Carter, 4 H. & N. 153; 28 L. J. Ex. 182.
(m) Wood, V.-C., North Western Ry. v. Elliott, 1 J. & H. 145; 29 L. J. C. 812; Caledonian Ry. v. Sprot, 2 Macq. 449; North Eastern Ry. v. Crossland, 2 J. & H. 565;

<sup>32</sup> L. J. C. 353; Siddons v. Short, L. R. 2 C. P. D. 572; 46 L. J.

<sup>(</sup>n) Murchie v. Black, 19 C. B. N. S. 190; 34 L. J. C. P. 337; Rigby v. Bennett, L. R. 21 C. D.

owner of the land upon which the burden is imposed; as in Acts for the maintenance of sewers, or gas works, or waterworks, which require and authorise the laying of pipes through the land of others (o). The right of support for railways and railway works is now regulated by the express terms of the Railways Clauses Act, 1845, which reserves the minerals to the vendor of land taken, subject to a right in the railway company to acquire them if necessary for the support of their works (p).

The easement of support for a building may also be Support by acquired by prescription; that is, from the long con-prescription. tinuance of the building without interruption of the support. It is an easement within the meaning of the Prescription Act (q). The owner of the servient tenement has no practicable means of interrupting the support without excavating his own tenement; for no action will lie merely for imposing a pressure upon his tenement by building upon the adjacent land; but a prescriptive title may, nevertheless, be acquired (r).

The extent of the right of support for a building de- Extent of pends upon the construction of it; the owner acquires by support. use, and primû facie by a grant, such support as the building in fact derives from the adjacent land, though the support may be materially extended by some peculiarity of the interior construction, provided there be no intentional concealment. But he cannot claim an extraordinary extent of support for some special construction that is concealed from the adjoining owner (s). Nor can an extraordinary extent of support be claimed by reason of the house having been built upon excavated ground, of which

(q) Selborne, L. C., Angus v. Dalton, L. R. 6 Ap. Ca. 740; Lemaitre v. Davis, L. R. 19 C. D. 281; 51 L. J. C. 173; post, p. 286. 281; 51 L. J. C. 173; post, p. 286.
(r) Dalton v. Angus, L. R. 6
Ap. Ca. 740; 50 L. J. Q. B. 689.
(s) Angus v. Dalton, L. R. 6 Ap.
Ca. 740; 50 L. J. Q. B. 689;
Lemaitre v. Davis, L. R. 19 C. D.
281; 51 L. J. C. 173; post, p. 291.

<sup>(</sup>o) Re Corporation of Dudley, L. R. 8 Q. B. D. 86; 51 L. J. Q. B. 121; Normanton Gas Co. v. Pope, 52 L. J. Q. B. 629. Sec Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17); Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Viet. c. 37). (p) Ante, p. 241.

the owner of the servient tenement had no means of knowledge; but in such case the support might be acquired by a continuance of the house without interruption after the owner of the servient tenement had become fully aware of the facts (t).—The easement of support acquired for an existing building cannot be enlarged by increasing the height and weight of the building; and if the support fails through the increased weight there is no ground of complaint (u). But the right to additional support for the building in its altered state may be acquired by enjoyment of it without interruption for a time sufficient to acquire an original prescriptive title (v).

Damage to buildings by support.

The right of support for the surface of land in its natural disturbance of state is not lost or impaired by building upon it; the owner may still claim for a disturbance of the surface, so far as it is not caused nor aggravated by the additional weight of the building. If it be found as a fact that the weight of the building did not contribute to the injury, the existence of the building upon the land is immaterial to the cause of action (w). And in such case damages may be assessed for the injury to the building consequent upon the wrongful disturbance of the surface, though there is no separate cause of action on account of the building (x). —The owner of a house without an easement of support may claim damages for an injury to the house by an improper use of the adjacent land in excess of the natural and reasonable use; or for carrying on works upon the land in a negligent and improper manner having regard to the neighbouring property (y). The negligence depends in some measure upon the knowledge of the adjacent

785.

<sup>(</sup>t) Partridge v. Scott, 3 M. & W. 220; Browne v. Robins, 4 H. & N. 186; 28 L. J. Ex. 250.

<sup>186; 28</sup> L. J. Ex. 250.
(u) Murchie v. Black, 19 C. B.
N. S. 190; 34 L. J. C. 337.
(v) Ingus v. Dalton, L. R. 6 Ap.
Ca. 740; 50 L. J. Q. B. 689.
(w) Browne v. Robins, 4 H. & N.
186; 28 L. J. Ex. 250; Hunt v.
Peake, Johns. 705; 29 L. J. C.

<sup>(</sup>x) Hamer v. Knowles, Stroyan v. Knowles, 6 H. & N. 454; 30 L. J. Ex. 102.

<sup>(</sup>y) Jones v. Bird, 5 B. & Ald. 837; Dodd v. Holme, 1 A. & E. 493; see Chadwick v. Trover, 6 Bing. N. C. 1; Gayford v. Nicholls, 9 Ex. 702; 23 L. J. Ex. 205.

owner of the existence and condition of the building, which may impose upon him the duty of exercising his rights in such a manner as will cause as little damage to it as possible (z). Where a person disturbs the support of his neighbour's house by works upon his own land, he is not excused merely by reason that he engaged a contractor to do the works and to do them without injuring the house (a): though he is not liable for damage done merely by the negligence of the contractor or his workmen in doing the works (b).

An easement of support for a house or building by the Support for adjoining building may be acquired, by grant or pre-adjoining scription, similar to the easement of support for a building building. by the adjacent land; so that the owner of the servient building would be precluded from removing it without substituting some other sufficient support (c). There is no presumptive right of mutual support between adjoining houses, in the absence of a special title; the owner of each house may pull it down, provided he do so in a careful and proper manner, without incurring liability to the owner of the other (d).

Where houses have been built together by the same Implied owner in a manner obviously requiring mutual support, grant. and are afterwards conveyed in separate tenements, there is implied in the conveyance, if no intention appears to the contrary, a grant and reservation of mutual rights and obligations of support between the several tenements (e). Where the porch and pediment of a house was built partly over the front of the adjoining house, upon a

<sup>(</sup>z) Dodd v. Holme, 1 A. & E. 493; Chadwick v. Trower, 6 Bing. N. C. 1.

<sup>(</sup>a) Bower v. Peate, L. R. 1 Q. B. D. 321; 45 L. J. Q. B. 446; Dalton v. Angus, L. R. 6 Ap. Ca. 740; 50 L. J. Q. B. 689; Lemaitre v. Davis, L. R. 19 C. D. 281; 51 L. J. C. 173.

<sup>(</sup>b) Butler v. Hunter, 7 H. & N. 826; 31 L. J. Ex. 214.

<sup>(</sup>c) Lemaitre v. Davis, L. R. 19 C. D. 281; 51 L. J. C. 173.

<sup>(</sup>d) Peyton v. Mayor of London, 9 B. & C. 725.

<sup>(</sup>e) Richards v. Rose, 9 Ex. 218: 23 L. J. Ex. 3.

severance of the houses by conveyance of the former, it was held that the whole porch and pediment presumptively went with it, with an appurtenant right of support from the other house (f).

Prescription.

An easement of support from an adjoining building may also be acquired by an uninterrupted enjoyment for the period required to found a prescriptive title, with the knowledge of the owner of the servient tenement. An enjoyment that is secret or surreptitious would not found any right; but it is sufficient if it be without concealment, and so open that it might be known to the owner of the servient tenement that some degree of support was enjoyed by the building. It is an easement within the Prescription Act (g). It is said, "properly constructed houses do not, as a rule, depend for their stability upon the existence of adjoining houses. No man can, therefore, from the mere existence in fact of this dependence, be presumed to have notice of it, and as a consequence be presumed in the event of his not interrupting it, to acquiesce in his neighbour's enjoyment of it. Such enjoyment offends against one of the cardinal rules governing the acquisition of an easement, namely, that the user must not be secret "(h).—Where a house was supported through the support of an intermediate house by the house next adjoining, it was held, upon the facts proved, that no easement of support had been acquired against the latter house merely by reason of the three houses having rested for a long time in that position, because the support through the intermediate house was not open to the knowledge of the owner of the tenement charged with the support (i).

Repair of

An easement of support from an adjoining building does

<sup>(</sup>f) For v. Clarke, L. R. 9 Q. B. 565; 43 L. J. Q. B. 178.
(g) Dalton v. Angus, L. R. 6 Ap. Ca. 740; 50 L. J. Q. B. 689; Lemaitre v. Davis, L. R. 19 C. D. 281; 51 L. J. C. 173.
(h) Thesiger, L. J., Angus v. Dalton, L. R. 4 Q. B. D. 167.

<sup>(</sup>i) Solomon v. Tintners' Co., 4 H. & N. 585; 28 L. J. Ex. 370. The judgment in this case suggests that no such prescriptive right can be acquired where the houses do not immediately adjoin. As to the support of land through an intermediate tenement, see ante, p. 244.

not cast upon the owner any implied obligation to repair servient the building in the absence of express obligation to that building. effect. According to the general principle of the law of easements the owner of the dominant tenement may enter upon the servient tenement for the purpose of doing whatever may be necessary to maintain the support to which he is entitled (j). Where a house was let for a term of years with the appurtenant easement of support by the wall of the adjoining house of the lessor, and the lessee covenanted to repair the demised premises during the term; the house having fallen out of repair by reason of the failure of the supporting wall; it was held that there was no implied obligation upon the lessor to repair the wall (k).

"There is no obligation towards a neighbour cast by Injury from law upon the owner or occupier of a house, merely as such, adjoining building. to keep it repaired; the only duty is to keep it in such a state that his neighbour may not be injured by its fall; the house may therefore be in a ruinous state provided it be shored sufficiently; or the house may be demolished altogether" (1). The occupier is primâ facie responsible that the property is not a nuisance and injurious to others: but the owner may also be chargeable, if he is ultimately responsible for its condition (m).—If the owner pulls his house down, he is bound to use proper care towards his neighbour and others according to the circumstances, and is responsible for injuries caused by doing it negligently (n). He is not bound to shore up the house of his neighbour, unless the latter have acquired an easement of support; nor is he bound to give him notice of his intention to pull down his own house or of the time of doing so: at least where his operations are open and obvious (o).

<sup>(</sup>j) 1 Wms. Saund. 322 (1), Pomret v. Ricroft; Colebeck v. Girdlers'
Co., L. R. 1 Q. B. D. 234; 45 L. J.
Q. B. 225; Stockport Highway Board
v. Grant, 51 L. J. Q. B. 357.
(k) Colebeck v. Girdlers' Co., supra.

<sup>(</sup>l) Chauntler v. Robinson, 4 Ex.

<sup>(</sup>m) Russell v. Shenton, 3 Q. B. 449; Todd v. Flight, 9 C. B. N. S. 377; 30 L. J. C. P. 21; Nelson v. Liverpool Brewery Co., L. R. 2 C. P. D. 311; 46 L. J. C. P. 675.

<sup>(</sup>n) Bradbee v. Christ's Hospital, 4 M. & G. 714.

<sup>(</sup>o) Peyton v. Mayor of London, 9

Support of upper story of house.

The like principles apply where the stories of a house are appropriated in separate tenements. Upon the grant or lease of an upper story with the reservation by the grantor of the lower story, the grantor impliedly undertakes not to do anything which will derogate from his grant; and the grantee or lessee of the upper story becomes impliedly entitled to the support of the lower story (p). The owner of the lower or servient story cannot, in absence of covenant or agreement, be charged with the further obligation to repair; the owner of the upper story being entitled, as an incident of his easement, to enter upon the servient tenement and provide the necessary support, though he cannot compel the owner of the servient tenement to do so (q).—So, if a lease be made of the lower story of a house reserving to the lessor the upper story, it seems that the lessor is not bound to repair the roof, nor subject to an action for not doing so, without a covenant or agreement on his part for that purpose; but the lessee may repair the roof himself as incident to the demise (r).—The occupier of a separate story is responsible if he makes an improper or negligent use of his tenement to the injury of the other occupiers. where the occupier of a warehouse put so great a weight on the floor that it fell through into the cellar occupied by another person, he was held liable for the damage caused to the goods in the cellar (s).

Repair of roof.

B. & C. 725; Chadwick v. Trower, 6 Bing. N. C. 1. (p) Parke, B., Harris v. Ryding, 5 M. & W. 71; per cur. Humphries v. Brogden, 12 Q. B. 756.

<sup>(</sup>q) See post, pp. 279, 280; Colebeck v. Girdlers' Co., L. R. 1 Q. B.

D. 234; 45 L. J. Q. B. 225. (r) 1 Wms. Saund. 322(1), Pomfret v. Ricroft.

<sup>(</sup>s) Edwards v. Halinder, 2 Leon. 93; Pop. 46; Stevens v. Woodward, L. R. 6 Q. B. D. 318; 50 L. J. Q. B. 231.

## § 6.—Fences.

Obligation of fencing land-trespass of cattle.

Right to have fence maintained upon adjoining land-grant-prescription.

Extent of right and liability—damages recoverable.

Ownership of fence-party walls.

Fencing of mines—fencing of railways—level crossings.

There is no presumptive obligation upon the owner of a Obligation of close of land towards the owner of the adjoining close to fencing land. fence the boundary of his close. "The law," it is said. "bounds every man's property and is his fence." But every man is bound to keep his cattle from straying on the land of others, and is liable for trespasses committed by his cattle and for all damages that are the direct natural consequence of such trespasses (a). The same rule prevails between persons having rights of common of pasture over land and the owner of the adjoining land. There is no obligation to fence against the commoners, who must keep their cattle from straying off the common, although there is no fence or marked boundary to the adjoining land (b). But the lord of a manor or his grantee who incloses waste under the Statute of Merton is bound to fence against commoners (c). And there is in some places between adjoining commons a custom of intercommoning known in law as common pur cause de vicinage, which has the force of excusing the straying of cattle from one to the other, so long as the commons remain open and unfenced (d).

"In the case of animals trespassing on land the mere Trespass of act of the animals, which the owner could not foresee, or cattle. which he took all reasonable means of preventing, may be

<sup>(</sup>a) Per cur. Star v. Rookesby, 1 Salk. 335; Churchill v. Evans, 1 Taunt. 529; Ellis v. Loftus Iron Co., L. R. 10 C. P. 10; 44 L. J. C. P. 24.

<sup>(</sup>b) Heath v. Elliott, 4 Bing. N. C.

<sup>(</sup>c) 2 Co. Inst. 87; Barber v. Whiteley, 34 L. J. Q. B. 212. See post, p. 363.
(d) Heath v. Elliott, supra. See

post, p. 338.

a trespass, inasmuch as the same act, if done by himself, would have been a trespass" (e). Upon this principle the owner of a horse was held liable for the horse kicking and biting another in the adjoining field through the fence; because the head and feet of the horse must have been extended into the adjoining field in order to do the injury, and so committed a trespass (f). So the sending a dog into the land of another is a trespass; but it is not "a trespass by entering or being upon land" within the statute 1 & 2 Will. IV. c. 32, s. 30, which renders such trespass, if committed in pursuit of game, penal (g). The claim of damages for trespasses of animals extends to damages that may be directly attributable to some special vice of the trespassing animal of which the owner was ignorant; although the owner is not generally liable for injuries committed by a mischievous animal unless he is aware of its mischievous nature (h). Where a straying horse kicked a child, it was held that the child, who had no claim for a trespass and its consequences, could not recover for the injury unless he could prove that the owner of the horse had knowledge of the propensity of the horse to kick (i).

Right of having fence upon adjoining close.

But the owner of a close of land may acquire the right of having a fence maintained upon the adjoining close for his benefit; and such right may be appurtenant to the one close as an easement, and the corresponding obligation may be imposed upon the other close as a servitude. right is more than a mere easement of using the servient tenement for the support of a fence, inasmuch as it imposes upon the servient owner the positive obligation of maintaining and repairing the fence for the service of the dominant tenement. The obligation attaches to the tene-

<sup>(</sup>e) Brett, J., Ellis v. Loftus Iron Co., L. R. 10 C. P. 13; 44 L. J. C. P. 24.

<sup>(</sup>f) Ellis v. Loftus Iron Co., L.R. 10 C. P. 12; 44 L. J. C. P. 24. (g) The Queen v. Pratt, 4 E. & B.

<sup>860; 24</sup> L. J. M. 113. (h) Lee v. Riley, 18 C. B. N. S. 722; 34 L. J. C. P. 212. (i) Cox v. Burbidge, 13 C. B. N. S. 830; 32 L. J. C. P. 89; explained in Lee v. Riley, supra.

ment, like a covenant running with the land, and is chargeable upon the occupier by reason of his possession (j).

This right may be claimed by a special title of grant, or by prescription: it may also be created by Act of Parliament, as is frequently the case in inclosures of commons (k). -Where the owner of two closes separated by a fence Grant. sells and conveys one close and reserves the other with the fence upon it, in the absence of express terms of grant or agreement, there is no implied grant of the easement of having the fence maintained for the benefit of the close sold; nor is there any obligation upon the vendor or his assigns to continue to maintain the fence (1). "Even where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing obligation to repair the fences is extinguished by the unity of ownership; and where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences does not revive, unless express words be introduced into the deed of conveyance for that purpose" (m). The same principle applies upon a lease of one of adjoining closes; in the absence of express stipulation in the lease there is no implied obligation upon the lessor to maintain existing fences of the closes reserved by him adjoining the demised land, so as to prevent the cattle of the lessee from straying on to them (n). On the other hand the tenant is presumptively bound to maintain the fences upon the land demised, and is liable to the landlord for not so doing upon the ground of the waste or injury done to the inheritance (o).

<sup>(</sup>j) Star v. Rookesby, 1 Salk. 335; Cheetham v. Hampson, 4 T. R.

<sup>(</sup>k) Star v. Rookesby, 1 Salk. 335; Buller, J., Rider v. Smith, 3 T. R. 768; Mellish, L. J., Erskine v. Adeane, L. R. 8 Ch. 763; 42 L. J. C. 838.

<sup>(1)</sup> Boyle v. Tamlyn, 6 B. & C.

<sup>(</sup>m) Per cur. Boyle v. Tamlyn, 6 B. & C. 337.

<sup>(</sup>n) Erskine v. Adeane, L. R. 8 Ch. 763; 42 L. J. C. 835. (o) Kenyon, C. J., Cheetham v. Hampson, 4 T. R. 319; ante, p. 35.

Prescription.

The right of having a fence maintained upon the adjoining close, with the corresponding obligation, may be established by prescription, that is, by proof of the fence having been constantly maintained and repaired in compliance with the obligation (p). The mere fact of maintaining the fence is no proof of the obligation; for it is presumed to be maintained for the use of the owner himself rather than of the owner of the adjoining land, though it may serve equally for the use of both. In order to prove a prescriptive right the fence must have been maintained under circumstances presumptive of legal obligation (q). A complaint by the owner of a close to the owner of the adjoining close of the escape of the cattle of the former through defects in the fence of the latter, would amount to a claim of right to have the fence repaired; because the complainant would otherwise be bound himself to keep his cattle from escaping; therefore repairs done in consequence of such complaint would be evidence of the obligation upon the servient tenement. But a complaint of the trespass of cattle from the adjoining close through defects of the fence would not import any claim of right as to the fence; because the owner of the cattle would be equally bound to keep them from trespassing, with or without a fence, and repairs done would not be evidence of any right or obligation (r). Where it appeared that a close of land was an ancient inclosure from the waste of a manor, and that the owners and occupiers had always maintained the fence against the cattle of the commoners of the waste; it was held to be a proper inference that the close was originally granted subject to the obligation of maintaining the fence, and that the obligation continued for the benefit of a recent inclosure of an adjoining part of the waste (s).

<sup>(</sup>p) Lawrence v. Jenkins, L. R. 8
Q. B. 279; 42 L. J. Q. B. 147.
(q) Boyle v. Tamlyn, 6 B. & C. 329; Hudson v. Tabor, L. R. 2 Q. B. D. 290; 46 L. J. Q. B. 463.

<sup>(</sup>r) Boyle v. Tamlyn, 6 B. & C. 329; Lawrence v. Jenkins, L. R. 8 Q. B. 274; 42 L. J. Q. B. 147.
(s) Barber v. Whiteley, 34 L. J. Q. B. 212.

The obligation upon the owner of the servient tenement Extent of imports generally the maintenance of a sufficient fence at right and liability. all times and in all events, the act of God and vis major only excepted. He is responsible for defects in the fence whether caused by his own negligence or that of servants, or by strangers or trespassers. He is not excused by want of notice to repair it, nor by want of a reasonable time for repairing it after notice of the defects (t).—The occupier of the dominant tenement may recover not only in respect of his own cattle escaping through a defect in the fence; but also for the cattle of others in his possession, whether on hire, or for reward, or as gratuitous bailee (u). Also a person using the close for his cattle by the licence of the occupier, and though only for that occasion, is equally entitled to recover (v). And if cattle from any other cause were lawfully upon the dominant close, the owner of the cattle may recover for their escape through a defect in the fence of the servient close (w). But if the cattle were wrongfully upon the dominant close, the owner of the cattle, having no claim upon the servient owner in respect of the fence, is liable for a trespass of his cattle upon the servient tenement (x).—On the other hand, the occupier of the servient tenement has no remedy against the dominant owner for trespasses of cattle entering through a defect in the fence; for it is sufficient answer to his claim that he, or those under whom or by whose licence he occupies, are bound to keep the fence in repair (y). Nor has he any remedy for damages done by the cattle after entering, as by breaking down inner fences; for such damage is the

<sup>(</sup>t) Lawrence v. Jenkins, L. R. 8 Q. B. 274; 42 L. J. Q. B. 147. (u) Rooth v. Wilson, 1 B. & Ald. 59.

<sup>(</sup>v) Dawson v. Midland Ry., L. R. 8 Ex. 8; 42 L. J. Ex. 49; per cur. Leke's Case, Dyer, 365 b.
(w) Per cur. Jones v. Robins, 10 Q. B. 640, explaining Smith v.

Baynard, 3 Keble, 417.

<sup>(</sup>x) Erskine v. Adeane, L. R. 8 Ch. 756; 42 L. J. C. 835; Ricketts v. East India Docks Ry., 12 C. B. 160; 21 L. J. C. P. 201; Dovaston v. Payne, 2 H. Bl. 531. (y) Nowel v. Smith, Cro. Eliz. 709; Carruthers v. Hollis, 8 A. & E. 113; Wiseman v. Booker, L. R. 3 C. P. D. 184; Child v. Hearn, L. R. 9 Ex. 176; 43 L. J. Ex. 100.

consequence of the defect of the fence (z). He has no right to distrain the cattle; nor is he justified in turning them out into a highway and there leaving them; but it seems that he must put them back into the adjoining close from which they escaped (a).

Damages recoverable.

The damages recoverable for an escape of cattle through the defective fence include all injuries to the cattle reasonably attributable to the risks that the cattle incur upon the servient close; as in cases where the cattle were there killed by falling into a ditch, and where they were killed by a hay-stack falling upon them (b), and where they were poisoned by feeding on the leaves of yew trees there growing (c).

Ownership of fence.

The ownership of ancient boundary fences is frequently a matter of mere presumption. In the case of the ordinary hedge and ditch fence between two closes of land the presumption is that the boundary of property is the outside of the ditch, so that both hedge and ditch prima facie belong to the close on the side of the hedge; this presumption being founded on the general custom of the country to dig the ditch at the boundary line and to throw the earth inwards to form the bank of the hedge (d). The filling up and obliteration of the ditch in process of time and an adverse occupation of the surface by the adjoining owner, as by cultivating it or building upon it, may create a possessory title in him to the site of the ditch under the Statute of Limitations (e). But the mere straying and feeding of cattle upon the site of the ditch is not a suffi-

 <sup>(</sup>z) Singleton v. Williamson, 7 H.
 & N. 410; 31 L. J. Ex. 17.

<sup>(</sup>a) Singleton v. Williamson, supra; Carruthers v. Hollis, supra.

<sup>(</sup>b) Anon., Ventris, 256; Powell v. Salisbury, 2 Y. & J. 391.

<sup>(</sup>c) Lawrence v. Jenkins, L. R. 8 Q. B. 274; 42 L. J. Q. B. 147. As to the responsibility for yew tress and other matters noxious to cattle upon the adjoining close,

Crowhurst v. Amersham, L. R. 4 Ex. D. 5; 48 L. J. Ex. 109; Wilson v. Newberry, L. R. 7 Q. B. 31;

son v. Newberry, L. R. 7 Q. B. 31; 41 L. J. Q. B. 31; Firth v. Bow-ling Iron Co., L. R. 3 C. P. D. 254; 47 L. J. C. P. 358. (d) Lawrence, J., Fowles v. Mil-ler, 3 Taunt. 138; Holroyd, J., Doe v. Pearsey, 7 B. & C. 307. (e) Norton v. London & N. W. Ry., L. R. 13 C. D. 268.

cient adverse possession to support such a title; nor is the clipping or mending of the fence alone sufficient (f).

Upon a like principle if a wall or fence between two Party-wall. properties is constructed with buttresses, posts, or spurs on one side, so as to show an inner and an outer face, it is presumptively the property of the owner of the land on the inner side. If the wall or fence be uniform on both sides, in the absence of evidence of exclusive ownership, it is presumptively a party-wall; that is, a wall built half on the land of each of the adjacent owners and belonging to them in undivided moieties as tenants in common (g). The presumptive ownership arising from the position and form of the wall may be rebutted by evidence of title to the entire wall, or to the several halves, in separate ownership (h). The wall may be a party-wall to a certain height, and above that height an external wall in several ownership (i). A description of property as "enclosed by a wall" imports that the wall is part of the property, so that a purchaser would not be compelled to take it without the wall (j). And a property cannot be said to "front, adjoin or abut" upon a road, if separated from the road by a wall belonging to another person (k).—One of co-tenants of a party-wall may repair it, and may pull it down, if necessary, for the temporary purpose of rebuilding it; but permanent destruction of the wall or exclusion of the other tenant from the use and possession, is wrongful (1). Each co-tenant is responsible for his own wrong or negligence in dealing with the party-wall, and for the damage caused thereby to the other co-tenant (m)—Under the Metropolitan Build-

<sup>(</sup>f) Searby v. Tottenham Ry. Co., L. R. 5 Eq. 409. (g) Cubitt v. Porter, 8 B. & C. 257; Watson v. Gray, L. R. 14 C. D. 192; 49 L. J. C. 243.

<sup>(</sup>h) Matts v. Hawkins, 5 Taunt. 20; Murly v. McDermott, 8 A. & E. (i) Weston v. Arnold, L. R. 8 Ch.

<sup>1084; 43</sup> L. J. C. 123. (j) Brewer v. Brown, L. R. 28

C. D. 309; 54 L. J. C. 605.

<sup>(</sup>k) Lightbound v. Bebington Local Board, L. R. 16 Q. B. D. 577; 55 L. J. M. 94.

<sup>(1)</sup> Cubitt v. Porter, 8 B. & C. 257; Standard Bank v. Stokes, L. R. 9 C. D. 68; 47 L. J. C. 554; Watson v. Gray, L. R. 14 C. D. 192; 49 L. J. C. 243; Stedman v. Smith, 8 E. & B. 1; 26 L. J. Q. B. 314.

(n) Bradbee v. Christ's Hospital,

ing Act, 18 & 19 Vict. c. 122, the rights of dealing with party-walls are regulated exclusively by the provisions of that Act relating to "Party Structures," s. 83, which supersede or qualify the common law rights of property. For the purposes of the Act a party-wall is defined by reference to the use made of it, independently of the ownership (l).

Fencing of mines.

Where minerals are separated from the ownership of the surface with the right of digging shafts and working through the surface, in the absence of express stipulation, there is an implied obligation on the owner of the minerals to fence the shafts for the protection of the owner of the surface; in which case the fence is maintained upon the dominant tenement (m). There is a statutory obligation to fence the shafts of abandoned mines, by the Metalliferous Mines Regulation Act, 1872, 35 & 36 Vict. c. 77 (n). The Quarry Fencing Act, 1887, 50 & 51 Vict. c. 19, provides that "any quarry dangerous to the public in open or unenclosed land within fifty feet of a highway or place of public resort dedicated to the public shall be kept reasonably fenced for the prevention of accidents, and unless so kept shall be deemed to be a nuisance." The term quarry is defined in the Act.

Fencing of railway.

By the Railways Clauses Act, 1845, 8 Vict. c. 20, s. 68, it is provided that "The company shall make and at all times maintain for the accommodation of the owners and occupiers of lands adjoining the railways, sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners and occupiers thereof from straying thereout, by reason of the rail-

<sup>4</sup> M. & G. 761; Hughes v. Percival, L. R. 8 Ap. Ca. 443; 52 L. J. Q. B. 719.

<sup>(</sup>l) Knight v. Parsell, L. R. 11 C. D. 412; 48 L. J. C. 395; Standard Bank v. Stokes, L. R. 9 C. D. 68; 47 L. J. C. 554.

<sup>(</sup>m) Groucott v. Williams, 4 B. & S. 149; 32 L. J. Q. B. 237; Churchill v. Evans, 1 Taunt. 529; Hawken v. Shearer, 56 L. J. Q. B. 284.
(n) Arkwright v. Evans, 49 L. J. M. 82.

way: provided that the company shall not be required to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them." The statutory obligation does not apply to fencing between the railway and adjoining land of the railway company, as a yard retained by the company for the use of persons driving cattle to and from the line (o); or a tramway adjoining the line kept for the use of the public upon payment of tolls (p).—The statutory Extent of obligation extends to the owner and occupier of the ad-liability. joining land and to persons using the land with their licence; who may recover for the loss of cattle straying on to the line through defects in the fence. But there is no general liability to other persons having no right or interest in the adjoining land, and whose cattle are not rightfully using it; and no claim can be made against a railway company for loss of cattle which were trespassing upon adjoining land and thence strayed on to the line (q). Compensation made under the proviso of the section to the owner of land instead of a fence does not discharge the obligation to the occupier during his then existing tenancy; and a tenancy from year to year was held to be a continuing tenancy for this purpose until determined by notice (r). A passenger on the railway cannot charge the company upon this statutory obligation in the case of cattle breaking through the fence on to the line and causing an accident; he can only charge them upon the ground of negligence in the protection of the line (s). Neither the company nor any person in their employment can complain of a trespass of the cattle of an adjoining owner through a defect in the

<sup>. (</sup>o) Roberts v. Great Western Ry., 4 C. B. N. S. 506.

<sup>(</sup>p) Marfell v. South Wales Ry., 8 C. B. N. S. 525. (q) Ricketts v. East & W. India Docks Ry., 12 C. B. 160; 21 L. J. C. P. 201; Dawson v. Midland Ry., L. R. 8 Ex. 8; 42 L. J. Ex. 49;

see Sneesby v. Lancashire & Y. Ry., L. R. 1 Q. B. D. 42; 45 L. J.

<sup>(</sup>r) Corry v. Great Western Ry., L. R. 7 Q. B. D. 322; 50 L. J.

<sup>(</sup>s) Buxton v. N. Eastern Ry., L. R. 3 Q. B. 549; 37 L. J. Q. B. 258.

fence which the company are bound by the statute to maintain (s).

Level crossings. The statutory obligation upon a railway company of keeping the gates closed at level crossings over highways extends to all persons and cattle whether lawfully using the highway or not; and the owner of cattle killed on the line may recover for the loss, though they had strayed off his land on to the highway and through the open gates of the level crossing (t). The statutory obligation does not apply to a private railway constructed for private purposes across a highway by leave of the highway authority; the owner of such railway is not bound to fence it, nor is he liable for the loss of cattle trespassing upon it (u).

## SECTION III. CREATION OF EASEMENTS.

§ 1. Grant.—§ 2. Prescription.

## § 1.—GRANT.

Easements created by grant or prescription—grant by deed—parol grant—Statute of Frauds—exception or reservation of easements—easements taken under Lands Clauses Act.

Implied grant of necessary easements—way of necessity.

Implied grant of apparent and continuous easements—no easement implied in derogation of grant—easements implied upon simultaneous grant of two tenements.

Grant of tenement "with appurtenants"—grant of easements "used and enjoyed" with tenement—construction of grants—easements revived after unity of possession—Conveyancing Act, 1881.

Implied grant of rights accessory to easements—right of maintenance and repair—obligation of servient owner.

## Easements created by

Easements are classed as incorporeal hereditaments; being incapable of possession and consisting in use only.

(s) Child v. Hearn, L. R. 9 Ex. 176; 43 L. J. Ex. 100.

(t) 5 & 6 Vict. c. 55, s. 9; 8 Vict. c. 20, s. 47; Fawcett v. York and Midland Ry., 16 Q. B. 610; 20 L. J. Q. B. 222; Ellis v. London &

S. W. Ry., 2 H. & N. 424; 26 L. J. Ex. 349; Charman v. S. Eastern Ry., W. N. 1888, p. 182. (u) Matson v. Baird, L. R. 3 Ap. Ca. 1082. They are thus distinguished, as subjects of property, from grant or prethe land itself to which they are appurtenant, which is held scription. in possession, and which at common law was transferred by delivery of possession, and therefore was said to lie in livery; while easements and other incorporeal hereditaments were said to lie in grant (a). Accordingly easements may be created by express grant by the owner of the servient tenement; or they may be established by prescription, that is, by use of the easement during the time required by law to raise the presumption of a grant. "Except where the positive law steps in, and in the absence of any legal origin gives to a fixed period of possession or enjoyment the status of absolute and indisputable right, every easement as against the owner of the soil must have had its origin in grant" (b).

The grant of an easement, as of all incorporeal heredita- Grant by ments, must be by deed sealed and delivered; for "the deed. deed of incorporeate inheritances doth equal the livery of corporeate" (c). Easements may also be created by testamentary devise, which for this purpose is equivalent to a grant by deed, and is subject to the same rules of construction and application (d).—The grant of an easement Grant for for a limited estate also requires a deed. "Although the limited term. authorities speak of incorporeal inheritances, yet the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject-matter; a right of common, for instance, which is a profit à prendre, or a right of way, which is an easement, can no more be granted or conveyed for life or for years without a deed, than in fee simple" (e). By the Conveyancing Act, 1881, Conveyancing 44 & 45 Vict. c. 41, s. 62, easements may be granted by

<sup>(</sup>a) Co. Litt. 9 a, b; ante, p. 185. (b) Cockburn, C. J., Angus v. Dalton, L. R. 3 Q. B. D. 102; 47

L. J. Q. B. 175. (c) Co. Lit. 9 a, b; per cur. Wood v. Leadbitter, 13 M. & W.

<sup>(</sup>d) Pearson v. Spencer, 1 B. & S.

<sup>571;</sup> see Polden v. Bastard, L. R. 1 Q. v. Loach, L. R. 4 Q. B. D. 494; 48 L. J. Q. B. 756.

<sup>(</sup>e) Per cur. Wood v. Leadbitter, 13 M. & W. 842; Hewlins v. Shippam, 5 B. & C. 221; Duke of Somerset v. Fogwell, 5 B. & C. 875.

way of use. "A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty or privilege in, or over, or with respect to that land or any part thereof, shall operate to vest in possession in that person that easement, right, liberty or privilege, for the estate or interest expressed to be limited to him."

Easements pass as appurtenant. But where easements have once been created as appurtenant to a tenement, they pass with the tenement by any effectual mode of conveyance in law or in fact; and equally with or without express mention of appurtenants in the conveyance of the dominant tenement. So at common law easements appurtenant to land passed by livery of seisin of the land without deed (f). And a demise of land without a deed, so far as it may be valid, will carry with it an appurtenant easement, as a right of way, because "the principal subject of demise is corporeal and the other right is a mere incident"; but "if a right of way were granted de novo a deed would be requisite" (g).

Parol grant.

The grant of an easement by parol only without a deed, though expressed to be absolute and perpetual, operates as a licence only, justifying the use of the easement so long as it continues in force, but revocable at any time; although the grantor may be bound by contract not to revoke it, and may be liable to an action for breach of contract in revoking it (h). But if an easement be in fact used and enjoyed by permission of the servient owner, though without a valid grant, he may recover the consideration or the value of it (i).—An easement appurtenant to a dominant tenement is "an interest in or concerning land" within the fourth section of the Statute of Frauds, and therefore any contract or agreement concerning it must be in

Statute of Frauds.

<sup>(</sup>f) Lit. s. 183; Co. Lit. 121 b; A. & E. 826.
Sacheverill v. Porter, Cro. Car. 482.
(g) Per cur. Bird v. Higginson, 6

(h) Ante, p. 195.
(i) Davis v. Morgan, 4 B. & C. 8.

writing (i). A mere licence to use land, not being an easement appurtenant to land, is not an interest in land within that statute; it may be given without deed and without writing (k). A licence is essentially revocable; only if attended with a valid grant of property it is not revocable in derogation of the grant (1).—A contract to grant an easement is a contract for the sale of real estate, and therefore is subject to the special rules affecting such contracts in respect of specific performance and damages (m).

An easement cannot be created by way of exception exception or from a grant of land, because an easement not being any reservation of easespecific part of the subject of grant, like timber or minerals, ments. is not properly a subject of exception. Nor can it be created by way of reservation upon a grant, for the term reservation is applied technically only to rents and services and such things as are stipulated to be rendered for the tenure of land. Therefore, in making a grant of land with the intention of retaining an easement over the land granted, as appurtenant to land reserved by the grantor, according to the technical rules of law, the easement must be created by a re-grant from the grantee of the land to the grantor; and the terms in a deed of grant expressing the exception or reservation of an easement, in order to effectuate the intention, must be construed to operate as a re-grant from the grantee, who becomes the owner of the land by the same deed (n).

Upon the above principle that an easement is an incor- Easements poreal right and no part of the land itself, it is held that under the Lands Clauses the term "land" in the Lands Clauses Act, which pro- Act. vides for the compulsory purchase of land for public undertakings, does not include easements, except such as

<sup>(</sup>j) McManus v. Cooke, L. R. 35 C. D. 681; 56 L. J. C. 662.

<sup>(</sup>k) Tayler v. Waters, 7 Taunt.

<sup>(</sup>i) Ante, p. 197. (m) McManus v. Cooke, L. R. 35 C. D. 681; 56 L. J. C. 662; Rowe

v. London School Board, L. R. 36 C. D. 619; 57 L. J. C. 179.

<sup>(</sup>n) Durham & Sunderland Ry.
Co. v. Walker, 2 Q. B. 940. See
Wickham v. Hawker, 7 M. & W.
63; Doe v. Look, 2 A. & E. 743.

are appurtenant to the land purchased and pass with it. If servient land is taken and discharged of easements under the absolute statutory title, the easements so lost to the dominant tenement are not matter of purchase as land, but are matter for compensation to the owner, to be settled in manner provided in the Act for compensating persons whose property is injuriously affected by the taking of the land (o). The person thus deprived of an easement has no ground of action or injunction, but can only proceed for compensation under the statute (p). Upon the same construction that "land" does not include easements, the compulsory powers of taking land do not extend to taking an easement over the land of another apart from the land; unless authority to do so is given by the special Act of the undertaking (q). So the power of a railway company to divert ways does not authorise them to enter upon land to make a new way, without having first acquired the land under their powers to purchase (r). But the special Act may give the power to take an easement, as the easement of tunnelling, or bridging, or crossing on a level; and the ordinary proceedings of the Lands Clauses Act will then apply to the purchase, subject to the provisions of the special Act(s).

Implied grant of necessary easements.

A grant of land, being a part of land previously held by the grantor in entirety, to which there could appertain no easements over the rest of the land during the united

(o) Eagle v. Charing Cross Ry., L. R. 2 C. P. 638; 36 L. J. C. P. 297; Clark v. London School Board, 297; Clark v. London School Board, L. R. 9 Ch. 120; 43 L. J. C. 421; Bedford v. Dawson, L. R. 20 Eq. 353; 44 L. J. C. 549; Macey v. Metrop. Board, 33 L. J. C. 377. See Buccleuch v. Metrop. Board, L. R. 5 H. L. 418; 41 L. J. Ex. 137; Artisans' and Labourers' Dwellings Act, 1875 (38 & 39 Vict. c. 36), 8 20 extinguishing easements over s. 20, extinguishing easements over land purchased; Swainston v. Finn, 52 L. J. C. 235.

(p) Wigram v. Fryer, 56 L. J. C. 1098; L. R. 36 C. D. 87.

(q) Jessel, M. R., Metrop. Ry. Co. and Cosh, L. R. 13 C. D. 616; Pinchin v. London and Blackwall Ry., 5 D. M. & G. 851; 24 L. J. C. 417.

(r) Rangeley v. Midland Ry., L. R. 3 Ch. 306; 37 L. J. C. 313. (s) Hill v. Midland Ry., L. R. 21 C. D. 143; 51 L. J. C. 774; Great Western Ry. v. Swindon Ry., L. R. 22 C. D. 677; 53 L. J. C. 1075.

possession, impliedly creates such easements for the benefit of the land granted over the land reserved by the grantor, as are necessary to render the grant effectual; upon the principle that a person cannot derogate from his own grant. The easements thus created are described as "easements derived by the disposition of the owner of two tenements" (t).

Accordingly, "where a man having a close surrounded Way of neceswith his own land grants the close to another in fee, for life, or for years, the grantee shall have a way to the close over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant" (u). So where land is devised by will, to which there is no access except over other land of the testator, a way of necessity is impliedly given to the devisee (v). The doctrine applies to land taken under compulsory powers for public purposes (w); and it applies where the grantor is a trustee of the close granted, without any beneficial interest (x). But the doctrine applies only to a grant or what is equivalent to a grant, from the owner of both tenements; it does not apply to tenements the titles to which are severed by escheat (y), nor does it apply in cases of necessity arising from other causes than severance of title, as where a way has been destroyed or has become impassable (z).—The Implied grant same doctrine is applied to the case where a person grants of way over land granted. the land surrounding a close, reserving the close to himself without expressly stipulating for access to it; there is then an implied grant of a right of way over the land granted for the use of the close reserved. It is implied by way of

<sup>(</sup>t) Mellish, L. J., Leech v. Schweder, L. R. 9 Ch. 472; 43 L. J. C. 490; James, L. J., in Master v. Hansard, L. R. 4 C. D. 721; 46 L. J. C. 505.

<sup>(</sup>u) 1 Wms. Saund. 323 n. (6), Pomfret v. Ricroft; Cairns, L. C., Gayford v. Moffatt, L. R. 4 Ch. 135; Pinnington v. Galland, 9 Ex. 1; 22 L. J. Ex. 348.

<sup>(</sup>v) Pearson v. Spencer, 1 B. &

S. 571; Pheysey v. Vicary, 16 M. & W. 484.

<sup>(</sup>w) Serff v. Acton Local Board, L. R. 31 C. D. 679; 55 L. J. C.

<sup>(</sup>x) Howton v. Frearson, 8 T. R.

<sup>(</sup>y) Proctor v. Hodgson, 10 Ex. 824; 24 L. J. Ex. 195. (z) 1 Wms. Saund. 323 a; Bullard v. Harrison, 4 M. & S. 387.

Nature and extent of way of necessity.

regrant from the grantee of the surrounding land; and though the latter do not execute the conveyance, by accepting the grant he subjects himself to all the conditions implied in it (a).—A grant of a way of necessity is implied only where there is no other way. Mere convenience of way, short of necessity, there being other reasonably convenient access available to the close, is not sufficient ground for implying a grant of the way (b). If there are two available ways, they cannot both be of necessity, and the election of the way to be used lies with the grantor of the close, who created the necessity, whether he granted or reserved the close to which the necessity is incident (c). "If the owner of the servient tenement does not point out the line of way, then the grantee must take the nearest way he can" (d). Where land was laid out for building upon a plan showing houses with a mews at the back, having the only access to the mews through an archway in one of the houses; it was held that a purchaser of the house with the archway took the house subject to a reservation of the way, having notice from the building plan of the necessity of the way, though the mews was not then in fact inclosed and was otherwise accessible (e). -The way may be limited in use by the requirements of the close in its state and condition at the time of the severance, which would be the general presumption in the case of agricultural land, requiring a way for agricultural purposes only; but the circumstances of the grant may show that the land is intended to be used for all purposes and the way would be enlarged accordingly (f). A grant of

<sup>(</sup>a) 1 Wms. Saund. 323, n. (6); Finnington v. Galland, 9 Ex. 1; 22 L. J. Ex. 348; London Corp. v. Riggs, L. R. 13 C. D. 798; 49 L. J. C. 297.

<sup>(</sup>b) Morris v. Edgington, 3 Taunt.24; Pheysey v. Vicary, 16 M. & W. 484; Proctor v. Hodgson, 10 Ex. 824; 24 L. J. Ex. 195; Dodd v. Burchall, 1 H. & C. 113; 31 L. J. Ex. 364; Brown v. Alabaster, L. R. 37 C. D. 490; 57 L. J. C. 255.

<sup>(</sup>c) Bolton v. Bolton, L. R. 11 C. D. 968; 48 L. J. C. 467, citing Clarke v. Rugge, 2 Roll. Abr. 60; Packer v. Welsted, 2 Sid. 111; and

Pearson v. Spencer, 1 B. & S. 585.

(d) Mellish, L. J., Wimbledon
Com. v. Dixon, L. R. 1 C. D. 370;
45 L. J. C. 353.

<sup>(</sup>e) Daries v. Sear, L. R. 7 Eq. 427; 38 L. J. C. 545. (f) Ante, p. 205; Gayford v. Moffatt, L. R. 4 Ch. 136; London

land to a local board was held to carry a way of necessity for all purposes for which the local board was constituted (g).—And it is said that a way of necessity is limited by the continuance of the necessity, and that it would cease, if by a subsequent purchase the dominant owner acquired a way over land of his own (h).

The doctrine of implied grant upon a disposition by the Implied grant owner of two tenements is extended to some easements of apparent and conused and enjoyed in fact at the time of severance (though tinuous easenot strictly of necessity), by reason of their being apparent ments. and continuous in use, as distinguished from easements that are not apparent and are only used occasionally. "There is a distinction between easements, such as a right of way, used from time to time, and continuous easements. And it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner by appropriate language, shows an intention that they should pass" (i). The easements here referred to are "those easements only which are attended by some alteration which is in its nature obvious and permanent; or, in technical language, those easements only which are apparent and continuous; understanding by apparent signs not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject "(i).— Where a dock and adjoining wharf had been held in

Corp. v. Riggs, L. R. 13 C. D. 798; 49 L. J. C. 297.

<sup>(</sup>g) Serff v. Acton Local Board, L. R. 31 C. D. 679; 55 L. J. C.

 <sup>(</sup>h) Best, C. J., Holmes v. Goring,
 2 Bing. 76; but see Parke, B.,
 Proctor v. Hodgson, 10 Ex. 828;
 24 L. J. Ex. 197; Fry, J., Bark-

shire v. Grubb, L. R. 18 C. D. 620.
(i) Per cur. Polden v. Bastard,
L. R. 1 Q. B. 161; 35 L. J. Q. B.
92; cited in Watts v. Kelson, L. R.
6 Ch. Ap. 173; 40 L. J. C. 126.
(j) Gale on Easements, p. 100,
5th ed., adopted in Pyer v. Carter,
1 H. & N. 916; 26 L. J. Ex. 261.

united ownership, during which the vessels lying in the dock were placed with the bowsprits extending over the wharf, whereby the dock was available for larger vessels than it would otherwise accommodate, and the wharf was afterwards conveyed separately to a purchaser without any express mention of the use of it for vessels lying in the dock, it was held that no grant of such use or easement could be implied. "The easement," it was said, "is not 'continuous,' for that means something the use of which is constant and uninterrupted; neither is it an 'apparent easement,' for, except when a ship is actually in the dock, with her bowsprit projecting beyond its limits, there is no sign of its existence; neither is it a 'necessary easement,' for that means something without which the enjoyment of the dock could not be had at all "(k).

Drains and watercourses.

Upon the above principle it is held that all drains then serving the tenement granted over the tenement reserved pass by implied grant, as being apparent and continuous, though not described or referred to in the instrument of conveyance; and drains are for this purpose considered to be apparent if with ordinary care and inquiry their existence could be ascertained (l).—Also watercourses, consisting of some actual construction on the servient tenement by which water is continuously brought to the dominant tenement for the use of the occupier, whether naturally or artificially, pass under the like circumstances by implied grant (m).

Implied grant of light.

Upon the same principle all lights of the tenement granted, which are apparently supplied over adjacent land of the grantor, pass by implied grant (n). "Where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or

<sup>(</sup>k) Suffield v. Brown, 4 D. J. & S. 185; 33 L. J. C. 249. (l) Pyer v. Carter, 1 H. & N. 916; 26 L. J. Ex. 258; Hall v. Lund, 1 H. & C. 676; 32 L. J. Ex. 113. See Evart v. Cochrane, 4 Macq. Sc. Ap. 117.

 <sup>(</sup>m) Nicholas v. Chamberlain, Cro.
 Jac. 121; Wardle v. Brocklehurst, 1
 E. & E. 1058; 29 L. J. Q. B. 145;
 Watts v. Kelson, L. R. 6 Ch. 173;
 40 L. J. C. 126.

<sup>(</sup>n) Holt, C. J., Tenant v. Goldwin, 2 L. Raym, 1093.

destroy the lights. That is based on the principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house simply as a house, or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or quasi easements" (o). easement is impliedly granted over the land of the grantor, though not strictly adjoining to the tenement granted, as where it is separated by a public road (p). But no similar easement attaches to a house built after the grant, nor to windows subsequently added, though with the knowledge and acquiescence of the grantor; nor though the land was sold for the purpose of building, unless under obligation to build on a specific plan requiring a definite easement of light over the land of the grantor (q). There is no difference in the extent of the right thus impliedly granted and that acquired by prescriptive use and enjoyment; it is measured by the access of light in fact enjoyed at the time of the grant (r). It is not enlarged by an express covenant for quiet enjoyment in the deed of conveyance; for such a covenant operates only as a further security to the subject of the conveyance (s).—The implied grant of light with the tenement conveyed may be expressly excluded by the terms of the conveyance; as where a conveyance was made of land "except rights, if any, restricting the free use of adjoining land or the conversion at any time thereafter of such land for building or other purposes." But such exception does not prevent the subsequent acquiring of such rights by prescriptive use (t). It may also be excluded or modified by the circumstances of the convevance, as where the tenement granted forms part of building land of which the grant of each part is under-

(o) Jessel, M. R., Allen v. Taylor, L. R. 16 C. D. 357; 50 L. J. C.

<sup>(</sup>p) Birmingham Banking Co. v. Ross, L. R. 38 C. D. 296; 57 L. J. C. 601.

<sup>(</sup>q) Blanchard v. Bridges, 4 A. &

E. 176. (r) Mellish, L. J., Leech v. Schweder, L. R. 9 Ch. 463; 43 L. J. C. 487.

<sup>(</sup>s) Leech v. Schweder, supra. (i) Mitchell v. Cantrill, L. R. 37 C. D. 56; 57 L. J. C. 72.

stood to be taken subject to buildings upon the adjoining land (u).

Easements not apparent and continuous.

Rights of way, in general, are not continuous easements, but are of occasional use only. Accordingly it is held that upon the disposition of two tenements ways used before severance, unless ways of necessity, will not pass without words sufficient to describe and convey them (v). But where there is a defined and made road over the servient tenement to and for the apparent use of the tenement granted or reserved, the right of way may pass as an apparent easement though not a way of necessity (w). Thus a road leading to entrance gates in a wall of the demised premises was held to pass by implied grant as being a continuous and apparent easement (x). So also a way through an archway under a house (y). A right of way to a well for the purpose of taking water is not a continuous easement, nor is it an easement of necessity; and therefore it will not pass by implication upon the severance of the tenements, the occupiers of which had previously used it (z).

Implied grant limited to estate of grantor.

The implied easement is limited in duration to the estate which the grantor has in the servient tenement at the time of the grant, and ceases with the expiration of that estate. It does not affect any estate or interest which he may subsequently acquire; and he may purchase the reversion free of all easements implied in his former grant unless he has bound himself by representations respecting them (a). An implied grant of easements can only be

Grant by trustee.

(u) Birmingham Banking Co. v. Ross, L. R. 38 C. D. 296; 57 L. J. C. 601.

(v) Pheysey v. Vicary, 16 M. & W. 484; Worthington v. Gimson, 2 E. & E. 618; 29 L. J. Q. B. 116; Dodd v. Burchall, 1 H. & C. 113; 31 L. J. Ex. 364; Pearson v. Spencer, 1 B. & S. 571; 3 ib. 761; Brett v. Clowser, L. R. 5 C. P. D.

(w) Bramwell, B., Langley v. Hammond, L. R. 3 Ex. 171; 37 L. J. Ex. 118; per cur. Watts v.

Kelson, L. R. 6 Ch. 174; 40 L. J. C. 128; and Brett v. Clowser, L. R. 5 C. P. D. 382; Chitty, J., Bayley v. Great Western Ry., L. R. 26 C. D. 441; Thomas v. Owen, L. R. 20 Q. B. D. 225; 57 L. J. Q. B. 198.

Q. B. D. 225; 57 L. J. Q. B. 198.
(x) Brown v. Alabaster, L. R. 37
C. D. 490; 57 L. J. C. 255.
(y) Davies v. Sear, L. R. 7 Eq.
427; 38 L. J. C. 546; ante, p. 268.
(2) Polden v. Bastard, L. R. 1
Q. B. 156; 35 L. J. Q. B. 92.
(a) Booth v. Alcock, L. R. 8 Ch.
663; 42 L. J. C. 557.

made over land of which the grantor is beneficial owner; there can be no such implication over trust property in breach of the trust. A contract of sale of land is in this respect equivalent to a legal conveyance; and a vendor of land before completion of the contract of sale, being in the position of trustee only for the purchaser, cannot by a subsequent grant and conveyance of adjacent land create any easement over the land previously sold (b).

Where the owner of two tenements grants one of them No easement to a purchaser, there can be no implied easement over the derogation of tenement granted for the benefit of the tenement reserved grant. by the grantor. "The grantor cannot derogate from his own absolute grant, so as to claim rights over the thing granted; even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him, the grantor" (c). In such cases "it appears to be an immaterial circumstance that the easement should be apparent and continuous, for non constat that the grantor does not intend to relinquish it, unless he shows the contrary by expressly reserving it. The law will not reserve anything out of a grant in favour of the grantor except in case of necessity" (d). Accordingly if the owner of a house and land grants away the land, reserving to himself the house, without expressly stipulating for the access of light, there is no implied grant by the purchaser of the land of the light previously used for the house; for such implication would operate in derogation of the express grant of the land. The purchaser may build upon the land as he pleases and thereby obstruct the light (e).

<sup>(</sup>b) Beddington v. Atlee, L. R. 35 C. D. 328; 56 L. J. C. 655. (c) Westbury, L. C., Suffield v. Brown, 4 D. J. & S. 194; 33 L. J. C. 259; Wheeldon v. Burrows, L. R. 12 C. D. 42; 48 L. J. C. 853.

<sup>(</sup>d) Chelmsford, L. C., Crossley v. Lightowler, L. R. 2 Ch. 486; Cotton, L. J., Russell v. Watts, L. R. 25 C. D. 572.

<sup>(</sup>e) Holt, C. J., Tenant v. Gold-win, 2 L. Raym. 1093; White v. Bass, 7 H. & N. 722; 31 L. J. Ex.

Easements implied upon simultaneous grants of two tenements.

Where two tenements are sold and conveyed at the same time by the same vendor to different purchasers, each being aware of the sale to the other, all the apparent and continuous quasi easements in use over the tenements at the time of the sale, in the absence of express stipulation, are impliedly granted with them. It is considered in equity as one transaction (f). Thus, in the case of a house and land of the same owner being sold by auction in separate lots to different purchasers, the purchaser of the house becomes presumptively entitled to the light as in fact enjoyed at the time of the sale, and the purchaser of the land is precluded from building in a manner to obstruct the light. The sales being sales by the same vendor and taking place at one and the same time, the rights of the parties are brought within the general rule of law, "that no man shall derogate from his own grant" (q). The same doctrine applies to dispositions by will of a house and land to two devisees separately (h). If the sales are not simultaneous the later purchaser takes subject to the title of the first purchaser, and is deprived of all easements not expressly reserved, except easements of necessity (i). But the several successive purchasers may be bound by a common plan upon which the lots appear to be mutually subservient to one another (j).—It is immaterial that the tenements are in the occupation of tenants at the time of the disposition and so out of the control of the grantor or testator; the presumption being that they are disposed of in their then existing condition with all the incidents of

283; Curriers' Co. v. Corbett, 2 Dr. & Sm. 355; Ellis v. Manchester Carriage Co., L. R. 2 C. P. D. 13; Wheeldon v. Burrous, L. R. 12 C.

Wheeldon v. Burrows, L. R. 12 C. D. 31; 48 L. J. C. 853.

(f) Per cur. Barnes v. Loach, L. R. 4 Q. B. D. 497; Jessel, M. R., Allen v. Taylor, L. R. 16 C. D. 355; 50 L. J. C. 178; Russell v. Watts, L. R. 10 Ap. Ca. 590; 55 L. J. C. 158.

<sup>(</sup>g) Swansborough v. Coventry, 9 Bing. 305; Compton v. Richards, 1

<sup>(</sup>h) Barnes v. Loach, L. R. 4 Q. B. D. 494; 48 L. J. Q. B. 756; Allen v. Taylor, L. R. 16 C. D. 355; 50 L. J. C. 178.

<sup>(</sup>i) Murchie v. Black, 19 C. B. N. S. 190; 34 L. J. C. P. 337. (j) Russell v. Watts, L. R. 10 Ap. Ca. 590; 55 L. J. C. 158.

ways, lights, and other easements apparently used and enjoyed between them (k).

The grant of a tenement expressed to be "with the Grant of teneappurtenants" has no additional efficacy in creating ease- ment with appurtenants. ments; although at the time of the grant quasi easements were in fact used and enjoyed with the tenement over other land of the grantor. For the term "appurtenant," applied to easements, includes only such easements, strictly so called, as are used as of right over land of another; and these pass with the grant of a tenement without being expressly mentioned or referred to (1). So a devise by will of a tenement "with the appurtenances" presumptively carries with the tenement no other easements than such as are strictly and legally appurtenant at the time of the devise (m). But the word "appurtenant" may have a more flexible construction in a deed or will if required by the context and circumstances, and may carry land or other rights, if the intention is clear that they shall pass by that description (n).—Upon the above principle upon a partition of land by tenants in common, who hold the land in undivided moieties, the conveyance of the shares in severalty, "with all easements and appurtenances," will not convert into easements over the separate tenements the ways or other quasi easements previously used over the entirety (o). So if a lease be made granting a right of way over other land of the lessor, the way is not thereby made appurtenant, strictly speaking, to the demised tenement; and an underlease of the tenement "with all ways thereunto appertaining" does not pass the way. "Leases generally contain the words 'heretofore used' by which

<sup>(</sup>k) Barnes v. Loach, L. R. 4 Q. B. D. 494; 48 L. J. Q. B. 756. (1) Ante, p. 189; Barlow v. Rhodes, 1 C. & M. 439; Brett v. Clowser, L. R. 5 C. P. D. 382.

<sup>(</sup>m) Whalley v. Tompson, 1 B. & P. 371; Pheysey v. Vicary, 16 M. & W. 484; Pearson v. Spencer, 1 B. &

S. 571.

<sup>(</sup>n) Cuthbert v. Robinson, 51 L. J. C. 238; Thomas v. Owen, L. R. 20 Q. B. D. 225; 57 L. J. Q. B. 198,

citing Plowden, 170.
(o) Worthington v. Gimson, 2 E. & E. 618; 29 L. J. Q. B. 116.

such a way would pass" (p). Rights and easements acquired as between the tenants do not affect the landlord, and therefore are not, strictly speaking, appurtenant to the respective tenements; they do not pass with the tenements as appurtenant or existing easements, though they may pass by the doctrine of apparent and continuous easements (q). Upon the same principle if a contract be made to sell a certain tenement "with the appurtenances," the purchaser is entitled to have a conveyance in those terms only, and not to have additional words inserted sufficient to grant rights then de facto used and enjoyed as easements over other land reserved by the vendor, such being rights of ownership and not merely appurtenant rights (r).

Easements used and enjoyed with tenement granted.

But the grant of a tenement expressed to be with all the rights and easements "used and enjoyed therewith" will create and pass as easements all those rights in the nature of easements which at the time of the grant were in fact used and enjoyed with the tenement over other land of the grantor; though such rights were not strictly speaking easements because they were used and enjoyed in right of the owner over his own land (s). Under a grant in such terms a way will pass which was in fact used and enjoyed for the service of the tenement granted, though in right of ownership of the land and not as an easement (t). Water rights that have been used and enjoyed with the tenement may pass as easements in the same manner (u).

Construction of grants as to easements used and enjoyed. What ways or other easements pass or are granted with the tenement by the description "used and enjoyed therewith," or by other similar expressions, depends in each case upon the construction of the terms of the grant in applica-

<sup>(</sup>p) Holroyd, J., Harding v. Wilson, 2 B. & C. 96.

<sup>(</sup>q) Daniel v. Anderson, 31 L. J. C. 610; ante, p. 274.

<sup>(</sup>r) Bolton v. Bolton, L. R. 11 C. D. 968; 48 L. J. C. 469. See Barkshire v. Grubb, L. R. 18 C. D. 616; 50 L. J. C. 731.

<sup>(</sup>s) James v. Plant, 4 A. & E. 749.

<sup>(</sup>t) Kooystra v. Lucas, 5 B. & Ald. 830; Barkshire v. Grubb, L. R. 18 C. D. 616; 50 L. J. C. 731; Bayley v. Great Western Ry., L. R. 26 C. D. 434.

<sup>(</sup>u) Wardle v. Brocklehurst, 1 E. & E. 1058; 29 L. J. Q. B. 145; Watts v. Kelson, L. R. 6 Ch. 166; 40 L. J. C. 126.

tion to the circumstances. A devise by will of a house, described "as now in the occupation" of a certain tenant, is construed as referring to the occupation merely for the purpose of identifying the house and not for the purpose of indicating the rights and uses incident to the occupation; consequently it was held not to grant as an easement the right of taking water from the adjacent land of the testator which the occupier had in fact been used to enjoy during the lifetime of the testator. If the devise had been of the house "as now enjoyed" by the occupier it might have been construed as passing the easement (v). Where a lease described the demised premises as abutting upon a newly made road according to a plan annexed to the lease; it was held that the terms of the lease estopped the lessor from denying the existence and use of the road, and thereby operated as a grant of a way along the site of it (w). But a lease describing the demised premises as bounded by an "intended" way, was construed not to be a grant of the way, but a mere expression of intention or contract, a breach of which might be measured in damages (x).

If servient and dominant tenements become united in Easements one ownership, all easements are extinguished; and though revived after unity of posthe actual use and enjoyment may be continued as before, session. it is in exercise of the right of ownership over the united tenements and not of an easement of one over the other. Hence the previously existing easements will no longer pass by a mere grant of the tenement to which they were formerly appurtenant; nor will they pass by the mere additional expression of "appurtenances" or "rights appertaining or belonging" to it. An easement thus extinguished, and continued by use only, may be revived and regranted with the tenement by the description of a

<sup>(</sup>v) Polden v. Bastard, L. R. 1 Q.B.156; 35 L.J. Q.B. 92; Martyr v. Lawrence, 2 D. J. & S. 261. (w) Roberts v. Karr, 1 Taunt. 495; Espley v. Wilkes, L. R. 7 Ex. 298; 41 L. J. Ex. 241. (x) Harding v. Wilson, 2 B. & C.

right or easement "therewith used and enjoyed" (y). But it is not necessary that an easement should have formerly existed as appurtenant to a tenement before unity of possession, in order to satisfy the description of being "therewith used and enjoyed." "It cannot make any difference in law, whether the right of way was only de facto used and enjoyed, or whether it was originally created before the unity of possession, and then ceased to exist as a matter of right, so that in the one case it would be created as a right de novo and in the other merely revived. But it makes a great difference, as matter of evidence on the question whether the way was used and enjoyed as appurtenant." The way which had existed previously to the unity of possession and which still continues to exist is obviously one to be used and enjoyed as appertaining to the other premises. In the case of the other way, it would require to be seen whether it had been so used and enjoyed. And if it appears that a way had been used solely for the convenience of the person who held both tenements, which convenience ceased when a severance took place, the way cannot be said to have been used and enjoyed as appurtenant to the severed tenement (z).

Conveyancing Act, 1881.

"In modern deeds the words 'therewith used and enjoyed' are generally inserted, because the words 'appertaining and belonging' are not sufficient," for the above reasons (a). The Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 6, enacts for the future as follows: "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey with the land (inter alia), all ways, watercourses, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the

<sup>(</sup>y) Whalley v. Tompson, 1 B. & P. 371; Bayley, B., Barlow v. Rhodes, 1 C. & M. 448; per cur. James v. Plant, 4 A. & E. 761.
(z) Blackburn, J., Kay v. Oxley, L. R. 10 Q. B. 367; 44 L. J. Q. B. 210; Thomson v. Waterlow, L. R. 6

Eq. 36; 37 L. J. C. 495; Langley v. Hammond, L. R. 3 Ex. 161; 37 L. J. Ex. 118; Barkshire v. Grubb, L. R. 18 C. D. 616; 50 L. J. C.

<sup>(</sup>a) Lyndhurst, C.B., Barlow v. Rhodes, 1 C. & M. 444.

land, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land or any part thereof." (2.) Similarly, as to a conveyance of land having houses or buildings thereon. (4.) "This section applies only if and as far as a contrary intention is not expressed in the conveyance, and subject to the terms of the conveyance" (b). And (6.) It "applies only to conveyances made after the commencement of the Act."

The grant of an easement impliedly includes all rights Implied over the servient tenement that are necessary for the full grant of rights accesuse and enjoyment of the easement; as expressed in the sory to easemaxim, "quando aliquid conceditur, conceditur et id, sine quo res esse non potest" (c). Thus the grant of a right of Right to way impliedly gives the right of making and repairing a repair. road for the convenient exercise of the right; and the right to a drain or watercourse gives a right of entry upon the land to cleanse and repair the channel (d). The right of support for a house by a wall or building imports the right to enter upon the servient tenement and do there whatever may be necessary to maintain the support (e). The grant of the easement of placing some artificial work upon the land of another, as a sewer or culvert, implies a grant of support for such work from the subjacent land (f); and the owner of the work being responsible for its condition and liable to others for damage caused by its defects necessarily has a right of access to the work to keep it in repair (g). The right appurtenant to a tenement for the occupants to supply themselves with water from a well or from a pump upon the tenement of another

<sup>(</sup>b) Whether a deed of convey-ance purporting in terms to pass "appurtenant" easements is a sufficient expression of a contrary intention to exclude the operation of this enactment, see Beddington v. Attee, L. R. 35 C. D. 331; 56 L. J. C. 655.

<sup>(</sup>c) See Co. Lit. 56 a.

<sup>(</sup>c) See CO. Lili. 50 a. (d) Ante, p. 210. (e) Ante, p. 251. (f) Re Dudley Corp., L. R. 8 Q. B. D. 86; 51 L. J. Q. B. 121. (g) Goodhart v. Hyett, L. R. 25 C. D. 182; 53 L. J. C. 219.

gives the right to maintain the well or the pump and to do what is necessary to keep it in order (h).—Upon this principle the right to build a bridge over a railway was held to give the accessory right to do everything reasonably necessary for the principal right of building the bridge, as to place scaffolding upon the soil of the railway, and for workmen to cross the line (i). So a right of building upon the surface would in general carry the accessory right of excavating the necessary foundations and disposing of the material excavated (j).

Obligation of servient owner.

There is no implied obligation upon the servient owner to repair for the benefit of the dominant owner, or to do anything beyond suffering the easement. "The additional obligation to repair could only be imposed upon the owner of the servient tenement by an express stipulation to that effect in the instrument creating the easement; or by some prescriptive right to the repair as well as to the easement." Nor, in general, are repairs done by the servient owner upon his own property any evidence of obligation on him to repair; as they must be presumed to be done for his own convenience, and not in consequence of any obligation (k).—The servient owner can do nothing upon his tenement that obstructs the right of the dominant owner to repair. Thus in the case of an easement of water supply through pipes the owner of the land was restrained from building over the pipes in such a manner as would prevent access for cleaning and repairing them (1). But the dominant owner is only entitled to such access as is reasonably necessary to repair the work, and not to any particular mode of access in one direction rather than another (m).

<sup>(</sup>h) Pomfret v. Ricroft, 1 Wms. Saund. 321; Lord Blackburn, Smith v. Archibald, L. R. 5 Ap. Ca. 512.
(i) Clarence Ry. Co. v. Great Northern Ry. Co., 13 M. & W. 706.
(j) Robinson v. Milne, 53 L. J. C. 1070.

<sup>(</sup>k) Stockport Highway Board v. Grant, 51 L. J. Q. B. 357; ante, p. 211.

<sup>(</sup>l) Goodhart v. Hyett, L. R. 25 C. D. 182; 53 L. J. C. 219.

<sup>(</sup>m) Birkenhead v. London & N. W. Ry., L. R. 15 Q. B. D. 572; 55 L. J. Q. B. 48.

## § 2.—Prescription.

Prescription—distinction of easements by prescription and grant.

Prescription at common law-time immemorial-non-existing grant.

The Prescription Act-prescription for ways, watercourses, and other easements-prescription for lights.

Enjoyment required for prescription—enjoyment as of right—in right of fee of dominant tenement against fee of servient tenementduring unity of possession-enjoyment of light as of right.

Secret enjoyment.

Enjoyment by licence or agreement—by sufferance.

Continuous enjoyment-voluntary discontinuance-impossibility of enjoyment-unity of possession.

Enjoyment for period next before action.

Interruption of enjoyment—submission of dominant owner.

Presumption from enjoyment short of prescribed period.

Disabilities of servient owner—suspension of computation—interruption during disabilities-exclusion of tenancy for life or years.

Prescription is the title to an easement derived from Prescription. continued use and enjoyment. Easements, being incorporeal hereditaments incapable of possession, are said to lie in grant; and prescription imports a grant as the origin of title. Corporeal hereditaments, being held in possession, are not the subject of prescription; but present possession of a corporeal hereditament is presumptive evidence of title, and continued possession by the Statutes of Limitation bars adverse claims (a).

An easement derived from prescription is defined and Distinction of limited exclusively by the evidence of use and enjoyment; prescription for though a grant is implied in law, the usage alone indicates the nature and extent of the right impliedly granted (b). On the other hand an easement created by Easements by express grant is defined and limited exclusively by the terms of the grant; and evidence of usage is not admissible to control the clear words of the grant. Evidence may be given of the state and circumstances of the tenements at

<sup>(</sup>a) Co. Lit. 113 b; ante, p. 185. (b) Ballard v. Dyson, 1 Taunt. 279; ante, p. 206.

Construction of grant.

the time of the grant in order to apply the language. Only if the language of the grant be obscure or doubtful, or if it be expressed in general terms, is evidence of the usage under it admissible to construe and explain the grant, though not to control it (c).—Again, in the construction of a grant the maxim is applied that a grant must be construed most strongly against the grantor. But with prescriptive easements derived from use only, where there are no words to construe, the presumption of right is always against the grantee; who can claim nothing beyond what the usage proves (d). Accordingly, an express grant of a way is construed presumptively to mean a general way for all purposes; but a prescriptive claim of a way is limited by the purposes for which the way has been in fact used (e). Upon the same principle an express grant of a drain for building land was construed to be general and not restricted to the use of the houses then built (f).

Prescription at common law.

Prescription is regulated partly by the common law and partly by the Prescription Act. Prescription at common law originally required a use and enjoyment of the right from "time immemorial," or, as it was expressed, "during time whereof the memory of man runneth not to the contrary." Proof of use and enjoyment during living memory was accepted as presumptive evidence of the same having continued from time immemorial; but proof of a commencement or of any interruption of the use at any time however remote defeated the immemorial presumption. The time required to establish a title to land was equally indefinite until limited from time to time by

Time immemorial.

<sup>(</sup>c) Chad v. Tilsed, 2 B. & B. 403; Wood v. Saunders, L. R. 10 Ch. 582; 44 L. J. C. 514; De la Warr v. Mills, L. R. 17 C. D. 535; 49 L. J. C. 487.

<sup>(</sup>d) Willes, J., Williams v. James, L. R. 2 C. P. 581; 36 L. J. C. P.

<sup>259;</sup> Wood v. Saunders, L. R. 10 Ch. 584; 44 L. J. C. 519; New Windsor v. Stovell, L. R. 27 C. D. 672; 54 L. J. C. 116.

<sup>(</sup>c) Ante, p. 206. (f) New Windsor v. Stovell, L. R. 27 C. D. 665; 54 L. J. C. 116.

statutes; of which the Statute of Westminster, 3 Edw. I. c. 39 (A.D. 1275) fixed the date for alleging seisin in a writ of right at the beginning of the reign of Richard I., A.D. 1189. By an equitable extension of this statute the same date was adopted by the Courts for the prescriptive title of easements and other incorporeal hereditaments; and evidence of commencement or interruption before that date became inadmissible (g). Accordingly, the production of a grant or other title destroyed the prescriptive title by showing the true origin; unless it could be shown that the grant was in confirmation of an earlier right, or that it was earlier than the above date (h).—Subsequent statutes limited various periods instead of the fixed date of the statute of Edward I. The statute 32 Hen. VIII. c. 2, limited the writ of right to sixty years, and possessory actions to fifty years, after the right first accrued. The statute 21 James I. c. 16, A.D. 1623, limited the possessory action of ejectment for the recovery of land to twenty years after the right accrued. But these statutes were not extended by the Courts to incorporeal hereditaments and easements in the same manner as the earlier statute of 3 Edw. I.; and immemorial prescription at common law was still required to date, presumptively at least, from the reign of Richard I. (i).

In order to meet the cases where a prescriptive claim Non-existing was defeated by proof of commencement or interruption grant. within legal memory, the Courts introduced the legal fiction of a later grant, the non-existence of which in point of fact might be attributed to loss or other causes. The use and enjoyment which was insufficient in duration to

because 'the said limitation of a writ of right is of so long time past." L. Blackburn, Datton v. Angus, L. R. 6 Ap. Ca. 811.

(h) Addington v. Clode, W. Blackst. 989; Church v. Tame, L. R. 2 C. P. 480, n.

<sup>(</sup>g) 2 Co. Inst. 238; Co. Lit. 114 b; Jenkins v. Harvey, 1 C. M. & R. 877. "This, when first introduced, gave a prescription of about eightysix years, but being a fixed date it became longer and longer, and already when Littleton wrote, in the reign of Edward IV., he observes on the inconvenience felt,

<sup>(</sup>i) Thesiger, L. J., Angus v. Dalton, L. R. 4 Q. B. D. 170.

maintain an immemorial prescriptive title then became available as secondary evidence of the lost or non-existing grant. Twenty years of uninterrupted enjoyment was generally adopted as the ground upon which the grant of an easement could and ought to be presumed, by analogy to the same limit appointed by statute for the protection from adverse claims of the possession of the land itself. The presumption cannot be rebutted by evidence merely that no grant was in fact made, any more than such evidence can be used to rebut immemorial prescription. For the presumption arises from the fact of the use and enjoyment, which must be attributed, if possible, to a rightful origin, and therefore to a grant as being technically the only legal origin of the right. But the presumption may be rebutted, or rather it does not arise, if it appears that the use and enjoyment of the easement, was not of such a kind as would found a prescriptive title, as where it is secret or precarious or wrongful. The presumption may also be rebutted by showing that a grant was legally impossible; as by reason of the incapacity of the grantor or other circumstances of the claim (i).— According to the above doctrines, where a way had been used as of right for twenty years without interruption, it was held that a grant of the right might be presumed; although it appeared that twenty-six years before there had been an Inclosure Act extinguishing all former rights of way over the spot in question (k). So it was held that a grant might be presumed from twenty years' enjoyment, though it appeared that before that time there had been a union of the possession of the dominant and servient tenements during which all easements and appurtenant rights

<sup>(</sup>j) Lord Blackburn, Dalton v. Angus, L. R. 6 Ap. Ca. 812. But see Brett, L. J., De la Warr v. Miles, L. R. 17 C. D. 591, who there says: "The doctrine with regard to the presumption of lost grants is at the present moment the subject of much controversy.

For my part I have always been of opinion, that if a judge is asked to find the fact of a grant and to say that it has been lost, he must have ground for believing that it was so."

<sup>(</sup>k) Campbell v. Wilson, 3 East, 294.

were necessarily extinguished (1). Easements appurtenant to houses, as the easements of light and support, could seldom be claimed by prescription at common law because few houses could be traced back even presumptively to time immemorial. Hence the claim to an easement of light has generally been founded upon twenty years' enjoyment; and this period was adopted by the Prescription Act to give an absolute and indefeasible title (m). So the claim to support for a house may be supported by twenty years' uninterrupted enjoyment (n).

The Prescription Act, 2 & 3 Will. IV. c. 71, by way of Prescription preamble recites, that "the expression time immemorial Act. or time whereof the memory of man runneth not to the contrary' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice." For remedy whereof the statute prescribes certain definite periods of time for the various species of easements, and other rights, as to which it enacts that they shall not be defeated by showing their commencement prior to those periods. It also prescribes certain periods during which an enjoyment of the rights shall render them absolute and indefeasible, and it regulates in various points the conditions of use and enjoyment upon which the statutory prescription may be founded.—The statute has not taken away any of the modes of claiming easements which before existed. Since the statute a claimant may have recourse to prescription from time immemorial, or to the doctrine of a non-existing grant; and he may be

<sup>(</sup>l) Cowlam v. Slack, 15 East, 108. (m) Darwin v. Upton, 2 Wms. Saund. 175 c; Cross v. Lewis, 2 B. & C. 686; Mellish, L. J., Leech v. Schweder, L. R. 9 Ch. 472; 43 L.

J. C. 487; Lord Blackburn, Dalton v. Angus, L. R. 6 Ap. Ca. 811; post, p. 287. (n) Angus v. Dalton, L. R. 6 Ap. Ca. 740; 50 L. J. Q. B. 689,

able to support his claim in these forms, though his evidences of enjoyment be such as do not satisfy the special conditions of prescription under the Act (o).

Prescription of twenty years for ways. watercourses, and other easements.

Sect. 2 enacts "that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water, being the property of any ecclesiastical or lay person, or body corporate, when

such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of

twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be

Forty years. defeated; and where such way or other matter shall have been enjoyed as aforesaid for the full period of forty years,

the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some

consent or agreement expressly given or made for that purpose by deed or writing."—This section does not sanction any new easements of a kind not before known to the law;

nor, on the other hand, is it restricted to such "other easements" only as are ejusdem generis with those mentioned, namely "ways and watercourses and the use of any water." It is construed as applying to all easements of whatever

kind, "to be enjoyed or derived upon over or from any land or water" (p).—The following easements have been held to be within the enactment: As to buildings, the right to lateral support from the adjoining land (q), also

(o) Aynsley v. Glover, L. R. 10 Ch. 283; 44 L. J. C. 523; Sel-borne, L. C., Dalton v. Angus, L. R. 6 Ap. Ca. 800; Lord Blackburn, ib. 814.

(p) Lord Selborne, L. C., Dalton v. Angus, L. R. 6 Ap. Ca. 798, differing from Erle, C. J., in Webb v. Bird, 10 C. B. N. S. 282, who expressed the opinion that it was meant only to apply to the two descriptions of rights specified, namely, rights of way and rights

(q) Dalton v. Angus, L. R. 6 Ap. Ca. 740; 50 L. J. Q. B. 689.

Easements within the section.

the right to support for a building from the adjoining building (r).—As to watercourses, the claim to discharge foul water, being the washing of minerals, into a watercourse (s); the claim to discharge sand and rubbish into a stream to be carried down and deposited upon the land of the lower proprietors (t). "The claim to have the water of a natural stream which would otherwise have flowed down to the claimant's land diverted over other land so as no longer to come to it, is a claim to a watercourse, and is one which may be created by grant "(u).

Sect. 3, enacts "that when the access and use of light Prescription to and for any dwelling-house, workshop, or other building, for lights. shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding; unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."-" The statute has in no degree altered the pre-existing law as to the nature and extent of the right"; it has only altered the mode of prescriptive acquisition (v). The customs of London and York to obstruct ancient lights by building upon ancient foundations, are avoided by the enactment (w).

The enjoyment required to found a prescriptive title at Enjoyment common law, and, subject to modifications therein men-required for prescription. tioned under the Prescription Act, is an actual enjoyment "as of right," continued without interruption for the period prescribed by law(x).—The expressions "enjoyment Enjoyment as

<sup>(</sup>r) Lemaitre v. Davis, L. R. 19 C. D. 281; 51 L. J. C. 173; Tone v. Preston, L. R. 24 C. D. 743; 53 L. J. C. 52.

<sup>(</sup>s) Wright v. Williams, 1 M. & W. 77.

<sup>(</sup>t) Carlyon v. Lovering, 1 H. & N. 784; 26 L. J. Ex. 251. See Murgatroyd v. Robinson, 7 E. & B. 391; 26 L. J. Q. B. 233.

<sup>(</sup>u) Blackburn, J., Mason v. Shrewsbury Ry., L. R. 6 Q. B. 583; 40 L. J. Q. B. 293.

<sup>(</sup>v) Per cur. Kelk v. Pearson, L. R. 6 Ch. 811; arte, p. 285. (w) Salters' Co. v. Jay, 3 Q. B. 109; Merchant Tailors' Co. v. Trus-

cott, 11 Ex. 855; 25 L. J. Ex.

<sup>(</sup>x) Co. Litt. 113 b; per cur.

as of right," and "claiming right thereto" as used in the Prescription Act are explained to mean "an enjoyment had, not secretly, or by stealth, or by tacit sufferance, or by permission asked from time to time; but an enjoyment had openly, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right" (y). An actual enjoyment "as of right" for the prescribed period was held sufficient, though it had been enjoyed under a mistaken claim of right; for it is immaterial upon what ground the claim of right is made, provided that the actual enjoyment is sufficient and capable of being referred to a legal origin (z).

In right of fee of dominant tenement.

The right must be claimed as appurtenant to the dominant tenement by the owner of the fee or in his right. The mode of pleading an immemorial prescription at common law is by alleging that the owner in fee of the tenement and all those whose estate he hath in the tenement from time immemorial have enjoyed the right claimed as appurtenant to the tenement; which is called prescribing in a que estate. The tenant of a particular estate for life, years or at will cannot plead such prescriptive title in right of his own estate or occupation; he must prescribe in right of the owner in fee of the tenement, and then derive title to the possession and enjoyment from him (a). Prescriptions for the times prescribed in the Prescription Act may be alleged in pleading according to the fact, the Act providing by sect. 5 that "it shall be sufficient to allege the enjoyment as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case,

Bright v. Walker, 1 C. M. & R. 219; Holford v. Hankinson, 5 Q. B. 584

bell v. Wilson, 3 East, 294.
(a) 6 Co. 60 a, Gateward's Case;
Baker v. Brereman, Cro. Car. 418;

Baker v. Brereman, Cro. Car. 418; Att.-Gen. v Gauntlett, 3 Y. & J. 93. See Davies v. Williams, 16 Q. B. 546; 20 L. J. Q. B. 330.

<sup>(</sup>y) Per cur. Tiekle v. Brown, 4 A. & E. 382.

<sup>(</sup>z) De la Warr v. Miles, L. R. 17 C. D. 535; 49 L. J. C. 487; Camp-

and without claiming in the name or right of the owner of the fee, as is now usually done." But the mode of pleading does not affect the nature of the claim as being of an easement appurtenant to the tenement in right of the fee (b).—The right must also be claimed against the Against fee servient tenement as binding the fee in the land and not tenement. merely the tenant of a particular estate; "if it give not a good title against all, it gives no good title at all." The tenant can bind himself and his own estate by grant only. The Act in shortening the time of prescription has made no difference in this respect, but has only changed the mode of acquiring the right (c).

the possession, and there can be no enjoyment of an easement as of right upon which a prescriptive title can be Accordingly, the actual enjoyment of the based (d). access and use of light for the windows of a house will not support a prescriptive claim so long as the house and the alleged servient tenement are in the same occupation (e).— Upon this principle a tenant in occupation under a lease cannot treat any use or enjoyment of the demised tenement as servient to another tenement of his own, in order to found a prescriptive claim to an easement against his landlord; nor though the tenancy was only from year to

year, which the landlord might put an end to by notice for the purpose of interrupting the enjoyment; nor though the use in question was not within the terms of the lease, if it was enjoyed in fact under the lease and by virtue of the position of lessee; as where the lease gave the right of making a certain drain through the land and the lessee made another different drain (f). Hence it seems that a

During unity of possession of the dominant and servient Enjoyment tenements in the same person all enjoyment is referred to during unity of possession.

<sup>(</sup>b) Bright v. Walker, 1 C. M. & R. 221. (c) Bright v. Walker, 1 C. M. & R. 211.

<sup>(</sup>d) Onley v. Gardiner, 4 M. & W.

<sup>496;</sup> Clayton v. Corby, 2 Q. B. 813.

<sup>(</sup>e) Harbidge v. Warwick, 3 Ex. 552; Ladyman v. Grave, L. R. 6 Ch. 763.

<sup>(</sup>f) Outram v. Maude, L. R. 17 C. D. 391; 50 L. J. C. 783; Lady-man v. Grave, L. R. 6 Ch. 768;

tenant for years of a house may prevent the accrual of an

easement by taking a tenancy of the adjacent servient land; and he cannot be said to prejudice thereby his landlord's right, because the landlord has no right before the lapse of twenty years (g).—Upon the same principle a tenant in occupation of the alleged dominant tenement cannot maintain a prescriptive claim by any enjoyment over another tenement of his lessor, because all the tenant's rights are derived from his landlord, who could not have an enjoyment as of right of an easement over his own property (h). Such is the position of copyholders claiming rights over the waste of the manor, which is vested in the lord as well as the freehold of the copyhold tenement; their rights are not prescriptive, but appurtenant to their tenements by custom of the manor (i).—" Where a person is trustee of that which is to be the dominant tenement, and is beneficial owner of that which is to be the servient tenement, there is not such a unity of possession as prevents the application of the statute or the application of the doctrine of a lost grant." Thus where a church was vested in the incumbent of the benefice as trustee for the use of the parish, and adjacent glebe land was vested in the incumbent for his own use, it was held that notwithstanding such unity of possession an easement of light over the glebe land might be acquired as appurtenant to the church (i).

Unity of title in trustee.

Enjoyment of light as of right.

Section 3 of the Prescription Act, providing for the enjoyment of light, omits the expression "as of right," which occurs in sect. 2 with regard to other easements; and the omission, it is said, is justified because such condition is inapplicable to the negative easement of light, there being no claim of right implied against the adjacent tene-

Chamber Colliery Co. v. Hopwood, L. R. 32 C. D. 549; 55 L. J. C.

<sup>(</sup>g) Hatherley, L. C., Ladyman
v. Grave, L. R. 6 Ch. 768.
(h) Warburton v. Parke, 2 H. &

N. 64; 26 L. J. Ex. 298; Gayford v. Moffatt, L. R. 4 Ch. 133; Daniel v. Anderson, 31 L. J. C. 610.

<sup>(</sup>i) See post, p. 568. (j) Eccles. Commis. v. Kino, L. R. 14 C. D. 213; 49 L. J. C. 529.

ment in opening a window for the access of light. omission, however, is immaterial as regards the actual enjoyment required as the basis of prescription, which must be "in the character of an easement, distinct from the enjoyment of the land itself," for this as for all other easements (k). Sect. 5 of the Act requires that in pleading easements it must be alleged that the enjoyment was "as of right," and no exception is there made of easements of light (1).—Under the above sect. 3 one of two tenants of separate tenements under the same landlord may acquire against the other an easement of light during their tenancies by an enjoyment of twenty years; though the easement would be extinguished upon the tenements reverting in possession to the landlord (m).

The rule of the civil law, that possession must not be secret enjoyclam or secret, "is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open" (n). It is sufficient if the enjoyment is so far open that the owner of the servient tenement has the means of information, if he please to inquire; and he will be taken to know what he might ascertain by inquiry. But if upon inquiry information were improperly withheld, or false or misleading information given, or anything done in order to keep material facts from his knowledge, the enjoyment in such case would be clam or secret, and would not support a prescriptive claim. Thus, in the case of a building erected upon the boundary line of a tenement, the owner of the adjoining tenement must be presumed to have knowledge of the fact that such a building cannot ordinarily stand without lateral support,

gus, L. R. 6 Ap. Ca. 827.

<sup>(</sup>k) Harbidge v. Warwick, 3 Ex. 552; Flight v. Thomas, 11 A. & E. 695; Plasterers' Co. v. Parish Clerks' Co., 6 Ex. 630; 20 L. J. Ex. 362.

<sup>(</sup>l) Ante, p. 288. (m) Frewen v. Phillips, 11 C. B.

N. S. 449; 30 L. J. C. P. 356; Mitchell v. Cantrill, L. R. 37 C. D. 56; 57 L. J. C. 72; see Daniel v. Anderson, 31 L. J. C. 610. (n) L. Blackburn, Dalton v. An-

and he must have imputed to him knowledge that an easement of support would be acquired against him unless he interrupts or prevents it (o). But if a building be erected upon excavated land so as to require extraordinary support from the adjoining land, the right could not be acquired by prescription unless the owner of the servient land knew or had the means of knowing the fact of the excavation (p). Where contiguous houses in a street had fallen out of the perpendicular and leaned one upon the other, it was held that their dependence for support was not so manifest and open as to found a prescriptive claim to its continuance (q).

Enjoyment by licence or agreement.

An enjoyment by licence asked and given, or by any agreement importing a licence, will not found a prescriptive title. "The asking leave from time to time within the forty or twenty years, breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and therefore the evidence of such asking within the period is admissible under a general traverse of the enjoyment as of right. It will follow that not only an asking leave but an agreement commencing within the period may be given in evidence under the general traverse, notwithstanding the words of the fifth section (that 'if the party rely on any matter not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and shall not be received in evidence on any general traverse or denial of such allegation'); for the party cannot and does not rely on it as an answer to an enjoyment as of right which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement; but as showing that there was not at the time when the agreement was made an enjoyment as of right." A licence or

<sup>(</sup>o) Selborne, L. C., *Dalton* v. *Angus*, L. R. 6 Ap. Ca. 801; L. Blackburn, *ib*. 828.

<sup>(</sup>p) Partridge v. Scott, 3 M. & W. 220. (q) Solomon v. Fintners' Co., 4 H. & N. 585; 28 L. J. Ex. 370.

agreement which covers the whole period of enjoyment, and shows a right during all that time, is a matter not inconsistent with the alleged enjoyment and therefore in the words of the statute "the same shall be specially alleged" (r).

By the Prescription Act, sect. 2, as to easements gene- Parol licence. rally, enjoyment for forty years gives an absolute title, "unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." And sect. 3 provides the same exception as to the twenty years' enjoyment of lights. In these cases a licence asked and given or an agreement made by parol is not within the exception of the statute, and therefore, if covering the whole period of enjoyment, it cannot be alleged in answer to the claim; but a licence asked or an agreement made within the alleged periods of enjoyment, whether in writing or not, contradicts the allegation of enjoyment as of right and so defeats the claim (s). Where a prescriptive right has been once acquired, it will not be affected by a subsequent act of the dominant owner in asking or accepting a licence, unless it amounts to a surrender of his vested right (t).

Where the owner of a house signed a document in Agreement writing to the effect that he had opened certain windows by leave of the owner of the adjacent land, and that he would at the request of him or his heirs or assigns at any time thereafter block up the same, and in the meantime would pay him his heirs and assigns sixpence a year for the indulgence; it was held to be an agreement within the exception of the statute, sect. 3; that it was binding upon the party who signed it, and upon a purchaser of the house with notice of it; and that it might be enforced in equity independently of its effect under the statute. It

<sup>(</sup>r) Per cur. Tickle v. Brown, 4 A. & E. 383; Monmouth Canal Co. v. Harford, 1 C. M. & R. 631; Beasley v. Clarke, 2 Bing. N. C. 705. See Kinloch v. Nevile, 6 M. &

W. 795.

<sup>(</sup>s) Tickle v. Brown, supra. (t) French Hoek v. Hugo, L. R. 10 Ap. Ca. 336; 54 L. J. P. C. 17.

was further held upon the construction of the agreement that it remained in force until the request to block the windows was made and acted upon; though if the money were left unpaid for twenty years it would be evidence that the agreement had been abandoned (u). An exception in a conveyance of land, of all "rights restricting the free use of the adjoining land or the conversion of such land at any time hereafter for building" was held to apply only to rights at the time of the conveyance, and not to operate as a consent or agreement within the statute, in respect of future enjoyment and acquisition of such rights (v).—Where the owner of a building which rested on the wall of the servient tenement, had entered into an agreement with the owner of the latter, upon notice given, to make a road over the site of the building; it was held that his enjoyment of the easement for the building was not of right, but determinable at any time under the agreement (w).

Enjoyment by sufferance.

The exercise and enjoyment of an easement by the dominant owner is sometimes attended with beneficial enjoyment by the servient owner; as in the case of a watercourse discharging into the servient tenement which is beneficial to the latter, or of diverting a watercourse from the servient tenement the flow of which would be prejudicial. But in such cases the servient owner acquires no right to the continuance of the easement and to the incidental advantages arising to him from it, his enjoyment being by sufferance only and not as of right, and subject to withdrawal at any time (x).

Continuity of enjoyment.

The enjoyment, both at common law and under the Prescription Act must be continuous during the periods

<sup>(</sup>u) Bewley v. Atkinson, L. R. 13 C. D. 283; 49 L. J. C. 193. (v) Mitchell v. Cantrill, L. R. 37 C. D. 56; 57 L. J. C. 72; cited ante, p. 271.

<sup>(</sup>w) Tone v. Preston, L. R. 24 C.
D. 739; 53 L. J. C. 50.
(a) Arkwright v. Gell, 5 M. & W.
203; Mason v. Shrewsbury and H.
Ry., L. R. 6 Q. B. 578; 40 L. J.
Q. B. 293; ante, p. 233.

prescribed; the continuity of enjoyment being required according to the nature of the easement. Thus, the enjoyment of a right of way being in its nature occasional only, the continuity consists in using the way as and when occasion requires; and a general right of way may be proved by evidence of using it for all purposes from time to time required, though the occasion for some of the purposes first arose within the prescribed period (y). Also a right of way may be limited to purposes which only occasionally recur (z). But a right of way for drawing wood from a plantation at the proper periods for cutting, which recurred at intervals of twelve years, was held to be too discontinuous in its nature to admit of proof under the Prescription Act, though it might be claimed and proved prescriptively at common law (a). The difference between easements to be enjoyed at long and short intervals, with reference to the statutory prescription, is one of degree rather than one of principle; the statute does not afford any certain test but leaves it to be treated as a question of fact (b).—The enjoyment of a watercourse may be in its nature intermittent, as a drain to carry away flood water or streams flowing during wet seasons only; and the intermissions do not prevent such a continuity of enjoyment as is required to support a prescriptive title (c). The continuous enjoyment of light does not import a continuous occupation of the house to which it is appurtenant; the access of light continues for the purpose of acquiring the right though the house be in fact uninhabited, and even though it be not fit for habitation, if it be structurally complete (d). But the flow of light must be continuous through the same defined opening; it cannot be claimed for a building in

<sup>(</sup>y) Dare v. Heathcote, 25 L. J.

<sup>(</sup>z) Bennison v. Cartwright, 5 B. &

S. 1; 33 L. J. Q. B. 137. (a) Hollins v. Verney, L. R. 13 Q. B. D. 304; 53 L. J. Q. B. 430.

<sup>(</sup>b) Hollins v. Verney, supra.

<sup>(</sup>c) Hall v. Swift, 4 Bing. N. C.

<sup>(</sup>d) Wilson v. Townend, 1 Dr. & Sm. 324; 30 L. J. C. 25; Courtauld v. Legh, L. R. 4 Ex. 126; 38 L. J. Ex. 45; ante, p. 215.

respect of an opening sometimes in one place and sometimes in another (e).

A voluntary abstinence from the exercise of an easement

Voluntary discontinuance.

is not such discontinuance of enjoyment as will prevent the accrual of a prescriptive title, unless attributable to an abandonment or defect of right. "There must be some interval in the enjoyment of all such rights; and the intermission must be a matter open in every case to explanation: and where actual enjoyment is shown before and after the period of intermission, it may be inferred that the right continued during the whole time "(f).—If the owner of the servient tenement pays a consideration to the dominant owner for ceasing to exercise the easement during a certain time, there is a constructive enjoyment during that time by means of the compensation received in place of the enjoyment (g). On the other hand, if the dominant owner on any occasion pays a consideration for the exercise of the right, it is a discontinuance of the enjoyment as of right, though it be not a discontinuance of the fact of enjoyment (h).—Also "an allegation that a person has a right to do anything at all times at his free will and pleasure, necessarily embodies in itself a tacit exception of those times at which the doing of the thing is rendered impracticable by natural events, whether ordinary or extraordinary;" as a right of way that may be rendered impassable by a flood, or at ebb or flow of the tide, or at certain seasons of the year (i).—Unity of possession of the dominant and servient tenements effects a discontinuance of the enjoyment as of right and stops the

accrual of a prescriptive title; because there is then no

Discontinuance for a consideration.

Impossibility of enjoyment.

Discontinuance by unity of possession.

<sup>(</sup>e) Harris v. De Pinna, L. R. 33 C. D. 238; 56 L. J. C. 344. (f) Carr v. Foster, 3 Q. B. 586; Tickle v. Brown, 4 A. & E. 369. (g) Patteson, J., Carr v. Foster, 3 Q. B. 585; Davis v. Morgan, 4 B. & C. 8; Ward v. Ward, 7 Ex. 838;

<sup>21</sup> L. J. Ex. 334.
(h) Tickle v. Brown, 4 A. & E. 369; Plasterers' Co. v. Parish Clerks' Co., 6 Ex. 630; 20 L. J. Ex. 362.
(i) See The King v. Tippett, 3 B. & Ald 202.

enjoyment of the easement as such (j). But it does not merge or extinguish a previously accrued title, unless there is also a unity of title (k). "The accruing right is only suspended during the union of the possession. So that if it had been shown that the enjoyment had lasted for fifteen years and upwards, and then there had been an interruption by unity of possession, and then the enjoyment had lasted for five years more without the unity of possession, in such a case an enjoyment for twenty years could have been pleaded" (1). But such enjoyment would not satisfy the Prescription Act, which requires an enjoyment for the period next before the commencement of the action (m).

Section 4 enacts, "that each of the respective periods Enjoyment of years shall be deemed and taken to be the period next before before some suit or action wherein the claim or matter to action. which such period may relate shall have been or shall be brought into question." Hence the proof of enjoyment must be brought down to the commencement of the action (n). Proof of the use of a way till within four or five years of the commencement of the action, there being no evidence or explanation given as to those years, was held insufficient to satisfy the statute; and upon the same principle evidence which failed to bring the enjoyment within fourteen months of the action was held insufficient (o). But evidence of exercise of the easement more or less continuous according to the nature of the claim will satisfy the statute, provided it be sufficient to raise the inference of a continued enjoyment during the whole statutory period (p). "A cessation of user which excludes an inference of actual enjoyment as of right will be fatal

<sup>(</sup>j) Ante, p. 190; Onley v. Gardiner, 4 M. & W. 496. (k) Aynsley v. Glover, L. R. 10 Ch. 283; 44 L. J. C. 523, post, p.

<sup>(1)</sup> Hatherley, L. C., Ladyman v. Grave, L. R. 6 Ch. 768.

<sup>(</sup>m) Sect. 4; Onley v. Gardiner, 4 M. & W. 496.

<sup>(</sup>n) Jones v. Price, 3 Bing. N. C.

<sup>(</sup>o) Parker v. Mitchell, 11 A. & E. 788; Lowe v. Carpenter, 6 Ex. 825.

<sup>(</sup>p) Ante, p. 295.

at whatsoever portion of the period the cessation occurs; and, on the other hand, a cessation of user which does not exclude such inference is not fatal, even although it occurs at the beginning or the end of the period. The only difference is that if the non-user occurs at the end of the period, there can be no subsequent user to explain it, and the inference of actual enjoyment for the full period next before action is more difficult to draw than in other cases" (a).—An enjoyment for the prescribed period next before the action in which the claim is brought in question satisfies the statute, though the period of enjoyment was not complete at the time of the injury complained of in the action. "The statute," it is said, "intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalise every act done in the exercise of the right during their continu-On the other hand, an enjoyment for the ance "(r). prescribed period up to the time of the injury complained of does not satisfy the statute, unless it be further continued up to the commencement of the action. "An enjoyment for twenty years or more before the act complained of gives only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit" (s).—An enjoyment for the prescribed period next before any action wherein the claim or matter is brought in question serves to establish the right generally; and "therefore, upon the bringing of any subsequent suit or action the claimant may rely upon an enjoyment satisfying the statute, ending with either the existing suit, or any of the previous suits or actions" (t).—Evidence of enjoyment that falls short of

<sup>(</sup>q) Per cur. Hollins v. Verney, L. R. 13 Q. B. D. 314; 53 L. J. Q. B. 436. (r) Wright v. Williams, 1 M. & W. 77.

<sup>(</sup>s) Richards v. Fry, 7 A. & E. 698; per cur. Ward v. Robins, 15 M. & W. 242.
\_\_(t) Cooper v. Hubbuck, 12 C. B.

<sup>(</sup>t) Cooper v. Hubbuck, 12 C. B. N. S. 456; 31 L. J. C. P. 323; Williams, J., dissentiente.

the commencement of the action, and therefore fails to prove a prescriptive title under the Act, may still be employed to prove a prescriptive title at common law or a presumed grant; for the Prescription Act has left these modes of claim as before (u).

Section 4 further enacts, "that no act or other matter Interruption shall be deemed to be an interruption within the meaning by servient owner. of this statute, unless the same shall have been, or shall be submitted to or acquiesced in for one year after the party interrupted shall have had, or shall have notice thereof, and of the person making or authorising the same to be made." "Interruption" in this section and in sections 1 and 2 means an adverse obstruction by the servient owner, not a mere voluntary cessation of enjoyment by the claimant; there must be an overt act indicating that the right is disputed (v). An adverse interruption within the statute also breaks the continuity of enjoyment, and enjoyment prior to the interruption cannot be called in aid to complete the required time (w). Payment of rent for the use of an easement is not an interruption of enjoyment within the statute, though it may operate as an admission of adverse right (x). Interruption may be made by an actual obstruction of the enjoyment upon the servient tenement; or by taking legal proceedings against the claimant for damages or for an injunction. But mere non-acquiescence or even express dissent on the part of the servient owner short of actual interruption or obstruction to the enjoyment is immaterial, according to the maxim qui non prohibet quod prohibere potest assentire videtur (y). Nor, on the other hand, is the acquiescence of the servient owner for less than the prescribed period of enjoyment material; nor

<sup>(</sup>u) Ante, p. 285. (v) Carr v. Foster, 3 Q. B. 581; Parke, B., Onley v. Gardiner, 4 M.

<sup>(</sup>w) Bailey v. Appleyard, 8 A. & E. 161.

<sup>(</sup>r) Plasterers' Co. v. Parish Clerks' Co., 6 Ex. 630; 20 L. J. Ex. 362;

ante, p. 296.
(y) Thesiger, L. J., Angus v.
Dalton, L. R. 4 Q. B. D. 172.

Interruption short of a year.

is any right in law or in equity gained thereby (z). In the case of lights an obstruction is the only mode of interruption, for no action will lie against a person for building a house upon his own land and opening windows in it which overlook his neighbour (a).—Interruption must continue for one year otherwise it is excluded from effect by the words of the statute. Consequently proof of enjoyment as of right brought down to within a year of the action in which the right is disputed cannot be defeated merely by showing an interruption begun within that year. follows that an enjoyment for nineteen years and a fraction will establish the right, provided the action be brought before the interruption has continued for the full period of a year "(b). It is said that as the statute requires an easement to have been actually enjoyed as of right without interruption during the prescribed period, there must be a corresponding opportunity of interruption, and therefore that the statute applies only to those easements which are exercised at least once a year, so as to give the opportunity of interruption within the statute throughout the whole period (c). A claim to use a road for carting timber from a wood at intervals of twelve years, being the only occasions when wood had in fact been cut, was held not to be sufficiently continuous and interruptible to admit of being made under the statute (d).—A partial or local interruption may operate to defeat the prescription so far as it extends, without affecting the claim of easement beyond the extent or degree of interruption (e).

Partial interruption.

Submission of dominant owner.

The submission to or acquiescence in the interruption on the part of the claimant is a matter of fact depending upon the circumstances. Complaints and protests under

<sup>(</sup>z) Blanchard v. Bridges, 4 A. & E. 194.

<sup>(</sup>a) Bayley, J., Cross v. Lewis, 2 B. & C. 689.

<sup>(</sup>b) Flight v. Thomas, 11 A. & E. 688; 8 Cl. & F. 231. (c) Parke, B., Lowe v. Carpenter,

<sup>6</sup> Ex. 831; per cur. Hollins v. Ver-

ney, L. R. 13 Q. B. D. 309; 53 L. J. Q. B. 430.

<sup>(</sup>d) Hollins v. Verney, supra; ante, p. 295.

<sup>(</sup>e) Welcome v. Upton, 6 M. & W. 536; Davies v. Williams, 16 Q. B. 546; 20 L. J. Q. B. 330.

certain circumstances may be enough to show that he does not submit or acquiesce, although he do not take any active steps to abate the interruption, or bring any action (f). Notice of the interruption and of the person making or authorising it, other than that arising from the mere existence of the obstruction, is a necessary condition precedent of submission under the statute (q). And the submission must continue for a year in order that the interruption may avail to defeat the prescription (h).

Section 6 enacts, "that in the several cases mentioned Presumption in and provided for by this Act no presumption shall be from enjoyment short of allowed or made in favour or support of any claim upon prescribed proof of the exercise or enjoyment of the right or matter period. claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim." "This section is addressed to presumptions as distinguished from legitimate inferences from facts. assumes proof of actual enjoyment for a less period than twenty years, and forbids any presumption being made simply from such short enjoyment in favour of an actual enjoyment for a longer period than that proved; but it does not forbid inferences from an enjoyment for a less period than twenty years and other circumstances, if there are any "(i). The statute does not affect the ordinary inference of continuous enjoyment derived from proof of enjoyment from time to time, having regard to the nature of the easement. Accordingly continuance of enjoyment at the commencement of the period of prescription may be proved by evidence of enjoyment at an earlier time. And continuance of enjoyment up to the commencement of the

<sup>(</sup>f) Bennison v. Cartwright, 5 B. & S. 1; 33 L. J. Q. B. 137; Glover v. Coleman, L. R. 10 C. P. 108; 44 L. J. C. P. 66.

<sup>(</sup>g) Seddon v. Bank of Bolton, L. R. 19 C. D. 462; 51 L. J. C. 542.

<sup>(</sup>h) Flight v. Thomas, 8 CI. & F.

<sup>(</sup>i) Per cur. Hollins v. Verney, L. R. 13 Q. B. D. 308; 53 L. J. Q. B. 433; Westbury, L. C., Hanner v. Chance, 4 D. J. & S. 626; 34 L. J. C. 416.

action may be inferred from evidence of preceding enjoyment continued to a sufficiently recent period (j). This enactment applies only to claims made under the statute. It does not affect the presumption of common law in aid of immemorial enjoyment from evidence of enjoyment within living memory; nor the presumption which may be made in certain circumstances of a non-existing grant (k).

Disabilities of servient owner.

Section 7 enacts "that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned; except only in cases where the right or claim is hereby declared to be absolute and indefeasible." A tenancy for years or from year to year is not amongst the excepted conditions of this section, though it is expressly excluded from the period of forty years by the following sect. 8. Hence an easement, as a right of way, may be acquired by twenty years of enjoyment, though during the whole or a part of the time the servient tenement was in occupation of a tenant for years (1).—The cases excepted from the section, "where the right or claim is declared by the Act to be absolute and indefeasible," are the claims founded upon an enjoyment for the full period of forty years under sect. 2 (which are subject to the excepted conditions of sect. 8), and the claim to light under sect. 3. Hence it appears that an easement of light now becomes absolute and indefeasible after an enjoyment of twenty years, without any allowance made for a tenancy of

<sup>(</sup>j) Lawson v. Langley, 4 A. & E. 890; Carr v. Foster, 3 Q. B. 581; ante, p. 297.
(k) Aynsley v. Glover, L. R. 10

Ch. 283; 44 L. J. C. 523; ante, (l) Palk v. Shinner, 18 Q. B. 568;

<sup>22</sup> L. J. Q. B. 27.

the servient tenement, or for any of the excepted conditions of the servient owner mentioned in the above section (m).

The computation of the prescribed period is only sus- Suspension of pended during the excluded conditions of disability, and upon the removal of the disability the computation is resumed from the point where it left off; the effect being to extend the period of continuous enjoyment which is necessary to give a right by so long a time as the excluded condition lasts. The claimant may prove an enjoyment for the prescribed period either wholly before the excluded condition, if it be still subsisting; or partly before and partly after, if it be removed (n). On the other hand, a discontinuance or interruption of enjoyment, as already noticed, arrests the computation altogether and defeats the claim (o).

computation.

The enjoyment during the conditions of disability, Interruption during disthough excluded from computation, is not exempted from abilities. interruption. The tenant in possession may actively obstruct the easement and interrupt the enjoyment; and "although the tenant for life cannot by acquiescence burthen the estate, he may by resistance free it "(p). The landlord or reversioner also may interrupt the enjoyment by bringing an action, where the easement consists in some positive act upon the tenement that is permanent and injurious to the reversion, as the building of a projecting eave to discharge rain water (q). But if the exercise of the easement is a mere trespass to the possession without injury to the reversion, as in the case of a way, or if it be no injury at all, as opening a new light, the landlord has no power of interruption, nor any remedy, unless he can procure his tenant to obstruct the easement or to bring an action (r).

<sup>(</sup>m) Simper v. Foley, 2 J. & H. 555; Frewen v. Phillips, 11 C. B. N. S. 455; 30 L. J. C. P.

<sup>(</sup>n) Clayton v. Corby, 2 Q. B. 813. (o) Onley v. Gardiner, 4 M. & W.

<sup>500;</sup> ante, pp. 294, 299.

<sup>(</sup>p) Per cur. Clayton v. Corby, 2Q. B. 825.

<sup>(</sup>q) Tucker v. Newman, 11 A. & E. 40; ante, p. 235.

<sup>(</sup>r) Baxter v. Taylor, 4 B. & Ad.

Exclusion of term for life or years from period of forty years.

Section 8 enacts "that when any land or water upon, over, or from which any such way or other convenient (s) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of enjoyment of any such way or other matter during the continuance of such term shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof." This section applies only to the period of forty years expressly mentioned, and has no implied application to the twenty years' period of the 2nd section (t).—The exclusion from computation by this section is not absolute, as that by the 7th section, but conditional only; the condition being that the person entitled to the reversion on the determination of the term for life or years shall within three years resist the claim, which condition must be strictly satisfied (u). The reversioner or his assignee only can take the benefit of the condition; and the term "reversion" is construed strictly and technically as not including a "remainder" (r).—"The effect of the 8th section (as already stated of the 7th section), is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment which is necessary to give a right by so long a time as the land is out on lease. subject to the condition therein mentioned" (w).

72; per cur. Frewen v. Phillips, 11 C. B. N. S. 455; 30 L. J. C. P. 356; Hatherley, L. C., Ladyman v. Grave, L. R. 6 Ch. 769. (s) The word "convenient" is

<sup>(</sup>s) The word "convenient" is probably a mistake for the word "casement" (see sect. 2); but it is doubtful if it can be so read. Jessel, M. R., Laird v. Briggs, L. R. 19 C. D. 33.

<sup>(</sup>t) Palk v. Shinner, 18 Q. B. 568; 22 L. J. Q. B. 27; ante, p. 286.

<sup>(</sup>u) Wright v. Williams, 1 M. & W. 100; Palk v. Shinner, supra.

<sup>(</sup>v) Wright v. Williams, supra, Laird v. Briggs, L. R. 19 C. D. 22; Symons v. Leaker, L. R. 15 Q. B. D. 629; 54 L. J. Q. B. 480.

<sup>(</sup>w) Per cur. Onley v. Gardiner, 4 M. & W. 500.

## SECTION IV. EXTINCTION OF EASEMENTS.

Release—presumption from disuse.

Abandonment-ways-lights-water easements.

Extinction of easement by unity of title of dominant and servient tenements—suspension of easement during particular estate—unity of legal title only.

Easements may be extinguished by release; by abandon- Release. ment; by unity of ownership of the dominant and servient tenements.—An easement being an incorporeal right, an express release, like a grant of the same, must be by deed under seal (a).—Upon the same principle that a grant Presumption of an easement may be presumed from long enjoyment, of release. a release may be presumed from long discontinuance of enjoyment. "Thus the long enjoyment of a right of way to a house or close over the land of another, which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of the land; and if such right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed "(b). Upon the same analogy, it is said "that as he can only acquire the right by twenty years' enjoyment, it ought not to be lost without disuse for the same period; and that as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a similar non-user, to raise a presumption of a release" (c).

"As an express release of the easement would destroy it Abandonat any moment, so the cesser of use coupled with any act ment.

<sup>(</sup>a) Co. Lit. 264 b; Willes, J., Lovell v. Smith, 3 C. B. N. S. 127. Ald. 791. (c) Littledale, J., Moore v. Rawson, 3 B. & C. 339. (b) Per cur. Doe v. Hilder, 2 B. &

clearly indicative of an intention to abandon the right would have the same effect without any reference to time." this respect, "it is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for consideration. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances" (d). Accordingly an easement may be considered as abandoned and lost, if the dominant owner makes such a permanent alteration of the dominant tenement, or if he suffers such a permanent alteration of the servient tenement, as renders further exercise of the easement useless or impracticable; but mere discontinuance of exercise without any act of abandonment does not affect the right further than that it tends in course of time to raise the presumption of a release; which presumption, however, may be rebutted by the circumstances of the discontinuance.—The above principles have been applied in the following cases.

Abandonment of ways.

A right of way granted for the use of a piece of open land, as such, was held to be abandoned and lost by covering the land with building; the Court saying that the grantee of the way could use it only for purposes compatible with the land remaining open according to the grant (e). A right of way to part of the dominant tenement was held to be lost by severing that part permanently from the principal part for the use of which only the way was appurtenant; as part of the yard of a house (f). Where land was sold to a railway company under the

<sup>(</sup>d) Per cur. The Queen v. Chorley, 12 Q. B. 519. See Crossley v. Lightowler, L. R. 2 Ch. 478; 36 L. J. C. 584.

<sup>(</sup>e) Allan v. Gomme, 11 A. & E. 759; ante, p. 206. (f) See Bower v. Hill, 2 Bing. N. C. 342.

powers of their Act, having stables built upon it with a way over a private road giving access to the stables, it was held that the right of way, being impliedly limited to the use of the stables, was abandoned and lost by the company pulling down the stables and converting the land into a railway (g).—On the other hand, where the use of a way was discontinued by the occupier of the dominant tenement, because he had for the time being a more convenient way over another close in his occupation, it was held to be no evidence of an intention to abandon the right (h). So where the owner of the dominant tenement used a variation of the way for the time being, by agreement with the owner of the servient tenement, it was held to be no evidence of abandonment of the original way (i). Where a doorway of a house opening on to a way had been bricked up by the owner, and after an interval of thirty years the door was re-opened and the way resumed, no change having been made in the interval upon the servient tenement; it was held to show merely a discontinuance of use and not an abandonment of the way (i). So where the way to a tenement by a navigable channel had been suffered to become choked with mud and impassable, it was held to be merely a voluntary suspension of the right, and not such an abandonment as would justify the servient owner in stopping it permanently (k).

The easement of light appurtenant to a house is pre- Abandonment sumptively abandoned by pulling down the house. Pulling of light. down a house with the intention of re-building upon the site does not affect the appurtenant easements; but it lies upon the dominant owner to show circumstances from which the intention of resuming his rights may be

<sup>(</sup>g) Bayley v. Great Western Ry., L. R. 26 C. D. 434. (h) Ward v. Ward, 7 Ex. 838; 21 L. J. Ex. 334. Willes, 282. (j) Cook v. Mayor of Bath, L. R. 6 Èq. 177. (k) Bower v. Hill, 1 Bing. N. C. (i) Lovell v. Smith, 3 C. B. N. S. 120. See Reignolds v. Edwards,

inferred. Where an ancient window had been closed up with brick and mortar and suffered to remain so closed for more than twenty years, it was held that the right was abandoned and lost, as if it had never existed (1). And where the owner of a house pulled it down and erected a blank wall in its place, it was held that he thereby presumptively abandoned the light appurtenant to the house; and, the adjoining owner having built close to the wall, he could not afterwards, upon opening a window in the wall in the position of the original light, complain of an obstruction (m). But where the owner of a house stopped up his windows, for the more convenient use of his house for a special purpose, it was held to raise no such presumption of the abandonment of his right to the light as would preclude him from re-opening the windows for the purpose of preventing the servient owner from building in a manner to obstruct the light (n).—An easement of light is also abandoned by pulling down the house and building a new house upon the site so materially different from the former, with respect to the position of the lights, as to leave no identity between the old lights and the new (o). But if the house be rebuilt so as to receive the light or some substantial part of it in the same position as before the easement to that extent is preserved. "It may be claimed in respect of any building which is substantially enjoying a part or the whole of the light which went through the old aperture." The light that is not substantially retained in the new house is considered as abandoned (p). If a very small portion of the ancient light in comparison with the new light is preserved, in respect of which the loss of light would be inappreciable.

Rebuilding with new lights.

<sup>(</sup>l) Ellenborough, C. J., Lawrence v. Obce, 3 Camp. 514. (m) Moore v. Rawson, 3 B. & C.

<sup>(</sup>n) Stokoe v. Singers, 8 E. & B. 31; 26 L. J. Q. B. 257.
(o) Fowlers v. Walker, 51 L. J. C.

<sup>43.</sup> 

<sup>(</sup>p) Scott v. Pape, L. R. 31 C. D.
570; 55 L. J. C. 429; Barnes v.
Loach, L. R. 4 Q. B. D. 494; 48
L. J. Q. B. 756; Newson v. Pender,
L. R. 27 C. D. 43; Greenwood v.
Hornsey, L. R. 33 C. D. 471; 55
L. J. C. 917; ante, p. 216.

the remedy would be lost, upon the principle that de minimis non curat lex, and the ancient light would be considered as wholly abandoned (q). And if in pulling down an ancient building and erecting a new one evidence of the position of the ancient lights be not preserved, they will be practically abandoned; because the owner will lose his remedy for an obstruction for want of evidence of his right. "He is bound to prove to the satisfaction of the Court that some particular part of the new window represents some substantial part of the old window" (r). Where a statutory power was given to pull down a church and sell the site for building, it was held that the rights of light that were appurtenant to the church were retained and might be sold with the site; and that they would be protected by the Court until new buildings were erected (s). -An easement of light may also be abandoned and lost by Licence to the dominant owner licensing or acquiescing in some per- obstruct per-manently. manent obstruction of the light upon the servient tenement. Where the owner of a house lighted from an adjoining area gave leave to build a skylight over the area to the obstruction of the light, it was held that after the work had been executed he was precluded from revoking the leave, according to the general principle of law "that a licence executed is not countermandable, but only when it is executory "(t).

The same principles apply to easements of water. If Abandonment the owner of a mill upon a stream of water pulls down easements. the mill and removes the works it is presumptively an abandonment of the water easements appurtenant to the mill(u). But the discontinuance of the use of a mill during a lease of the water rights to another mill owner for the term of ninety-nine years was held not to be an

<sup>(</sup>q) Heath v. Bucknall, L. R. 8 Eq. 1; 38 L. J. C. 372, explained in Staight v. Burn, L. R. 5 Ch. 163; 39 L. J. C. 289. (r) Fowlers v. Walker, 51 L. J. C. 443. See Scott v. Pape, supra.

<sup>(</sup>s) Eccles. Commis. v. Kino, L. R. 14 C. D. 213; 49 L. J. C. 529.

<sup>(</sup>t) Winter v. Brockwell, 8 East, 308; Johnson v. Wyatt, 2 D. J. & S. 18; 33 L. J. C. 397.

<sup>(</sup>u) Per cur. Liggins v. Inge, 7 Bing. 693.

abandonment of the right to the water, which reverted at the end of the lease, though the mill had been pulled down during the lease (v). Where works which had been used for dyeing, with the appurtenant easement of discharging the water fouled by the dye-works into a stream, had been disused for more than twenty years and had been suffered to go to ruin, during which time other riparian owners had erected works upon the stream; it was held that the easement was abandoned and could not be resumed to the injury of the other works (u). Where the owner of a mill with water easements gave licence to a riparian owner to cut through the bank of the mill stream and erect a weir for the purpose of diverting the water to a mill of the latter, it was held that after allowing such works to be executed he could not countermand them and require them to be pulled down so as to restore the flow of water to his own mill (x). But such licence would be revocable, except so far as it had been acted upon and expense incurred; for it is on that ground only that it can be irrevocable (y). Where a canal company constituted by statute, with power to divert natural streams to feed the canal, by a subsequent Act was empowered to convert the canal into a railway; it was held that in abandoning the canal the company lost their right to take and dispose of the water, and consequently the lower riparian owners were restored to their rights to have the streams flow in their original course (z). And under like circumstances it was held that the lower riparian owners were obliged to suffer the flow of the stream in its original course as before the diversion, although it was injurious to them (a).

Easements are extinguished by the titles of both the Extinction by unity of title. dominant and servient tenements becoming united in one

<sup>(</sup>v) Davis v. Morgan, 4 B. & C. 8. (v) Davis V. Morgan, 4 B. & C. S. (w) Crossley v. Lightowler, L. R. 2 Ch. Ap. 478; 36 L. J. C. 584. (x) Liggins v. Inge, 7 Bing. 682. (y) Mason v. Hill, 5 B. & Ad. 1.

<sup>(</sup>z) National Manure Co. v. Donald, 4 H. & N. 8; 28 L. J. Ex. 185. (a) Mason v. Shrewsbury Ry., L. R. 6 Q. B. 578; 40 L. J. Q. B. 293.

person; because all uses and enjoyments of the servient tenement then become referable to the simple right of ownership. An easement cannot be maintained as a distinet right by an owner over any part of his own land; it essentially requires a dominant and a servient tenement in separate ownership (b).

If the unity of title continues for a particular estate Suspension only, as for a tenancy for life or years in one of the tene-ticular estate. ments, the easement is suspended during that estate; but it is not wholly extinguished, because there is no unity of the seisin of the fee simple, and upon the expiration of the particular estate it will revive for or against the reversioner (c). Accordingly "where there is a unity of seisin of the land and of a way over the land in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and after such extinguishment or during such suspension of the right the way cannot pass as an appurtenant under the ordinary legal sense of that word." "In order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one 'used and enjoyed with the land' which forms the subjectmatter of the conveyance" (d). Where a lessee for years granted easements of way over the demised tenement in favour of the reversioner who held the adjacent tenement, it was held that by a subsequent conveyance of the reversion to the lessee and consequent merger of the term of years, the easements which had been granted by the termor were extinguished. The easements depended upon the duration of the lease and came to an end with the ter-

mination of the lease (e).—Upon the same principle

<sup>(</sup>b) Ante, p. 190. (c) Thomas v. Thomas, 2 C. M. & R. 34; Simper v. Foley, 2 J. & H. 555; Aynsley v. Glover, L. R. 10 Ch. 283; 44 L. J. C. 525.

<sup>(</sup>d) Per cur. in James v. Plant, 4 A. & E. 761; Pheysey v. Vicary, 16 M. & W. 484; ante, p. 276. (e) Pearson, J., Dynevor v. Tennant, L. R. 32 C. D. 381; S. C.,

"where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership; and where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose" (f).

Unity of legal title only.

But if one of the tenements is held in trust, the unity of legal title does not operate as an extinction of the appurtenant easements, because there is no union of the beneficial ownership. Thus where a church with ancient lights vested in the incumbent in right of his office, and the adjacent servient tenement, being glebe land, vested in him beneficially, it was held that there was no such unity of ownership as to extinguish the easements of light appurtenant to the church, and to justify him as owner of the glebe land in obstructing them (g). Upon the same principle no easement can be created by implied grant over land of which the grantor is only trustee (h).

L. R. 33 C. D. 420; 55 L. J. C. 817.
(f) Per cur. Boyle v. Tamlyn, 6
B. & C. 337.

(g) Eccles. Commiss. v. Kino, L.
R. 14 C. D. 213; 49 L. J. C. 529.
(h) Beddington v. Atlee, L. R. 35
C. D. 328; 56 L. J. C. 655.

#### Section V. Remedies for Easements.

Action for damages - nominal damage - disturbance of easement - compensation under Lands Clauses Act.

Action by reversioner-repeated actions for continuance of disturbance. Injunction—statutory and equitable jurisdiction—principles of granting injunction-mandatory injunction to remove nuisance-delay or acquiescence-interlocutory injunction.

Injunction against obstructing lights.

Abatement of nuisance to easement—abatement of nuisance to servient tenement -- exercise of easement in excess -- notice to abate nuisance -unnecessary damage.

The remedies for the protection of an easement are, by action for damages; by action for an injunction; by the dominant owner himself abating the nuisance or obstruction to his right.

An action may be maintained for the disturbance or Action for obstruction of an easement without proof of loss or damage actually sustained, and judgment may be recovered for a nominal sum, if the act of disturbance is such as may injuriously affect the title to the easement. Accordingly Nominal it was held that a person might maintain an action for a damages. permanent obstruction of a way upon the servient tenement, though the way was at the time so obstructed upon his own tenement as to be incapable of use; the Court saying there was an injury to the right, though no damage accrued therefrom, for if acquiesced in for twenty years it would become evidence of an abandonment of the right; and therefore the plaintiff was entitled to a verdict with nominal damages (a). So, the owner of a house may maintain an action for an obstruction of the light appurtenant to the house, though he be not in occupation, and though the house be wholly unoccupied. or even not fit for occupation, so that no actual damage

<sup>(</sup>a) Bower v. Hill, 1 Bing. N. C. 549; ante, p. 307.

accrues from the obstruction (b).—So a riparian owner may maintain an action for wrongfully diverting a natural watercourse, or for an unreasonable use of the water, or for polluting the water, although he may not himself require the use of the water or be able to prove any actual damage; because such acts affect the right by affording evidence of adverse rights (c). An additional pollution of a stream already polluted is a cause of action though it produce no perceptible damage by reason of previous pollutions; because upon the cessation of other pollutions the damage would become substantial and the continuance of the pollution would in time create a right (d).

Disturbance of easement.

But the disturbance of the easement must be substantial, having regard to the nature of the easement, in order to give a cause of action. A person entitled to a right of way cannot complain of an obstruction that does not interfere with the reasonable use of the way. Thus in the case of a portico to a house projecting only two feet into a roadway forty feet wide, it was held that under the circumstances the portico was not an actionable obstruction; the Court said that if the roadway had been granted to the plaintiff by a conveyance setting out boundaries, he might have maintained an action of trespass; but the grant being only of the easement of a reasonable use of the road, there was no substantial interference with his right (e).—So with the easement of light, there must be a sensible and appreciable privation of light to give a cause of action; "there are many cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an action upon the case "(f). -So with water rights, in an action by a riparian owner for

<sup>(</sup>b) Courtauld v. Legh, L. R. 4 Ex. 126; 38 L. J. Ex. 45.

<sup>(</sup>c) Mason v. Hill, 3 B. & Ad. 304; 5 B. & Ad. 1; Wood v. Waud, 3 Ex. 748; Embrey v. Owen, 6 Ex. 353; Crossley v. Lightowler, L. R. 2 Ch. 478; 36 L. J. C. 584. (d) Ib.; Pennington v. Brinsop

Hall Coal Co., L. R. 5 C. D. 769; 46 L. J. C. 773.

<sup>(</sup>e) Clifford v. Hoare, L. R. 9 C. P. 362; 43 L. J. C. P. 225.
(f) Eldon, L. C., Att.-Gen. v. Nichol, 16 Ves. 343; Wood, V.-C.,

Dent v. Auction Mart, L. R. 2 Eq. 245; 35 L. J. C. 560.

causing a natural stream to flow with greater violence than it ought to do in its usual course, to the injury of the plaintiff's banks, it was held necessary to prove actual damage to the banks as the test of the injury (g). And in an action by a riparian owner against another for an unreasonable use of the water, he must prove that a sensible diminution of the natural flow of the stream was caused by abstraction of the water (h).

The disturbance of an easement, if it be actionable, is an Compensation injurious affecting of the dominant tenement within the under Lands Clauses Act. provisions of the Lands Clauses Act, 1845, 8 Vict. c. 18, which give compensation for acts otherwise authorised by statutory powers. The deprivation of an easement under the compulsory powers of the Act gives no claim for a valuation as for land taken, nor does it give any ground for an action or for an injunction, but only for compensation for injuriously affecting the land (i). Thus an obstruction of light is an injurious affecting of a tenement within the Act, and the occupier is held entitled to recover compensation not only for the depreciation of the tenement, but also for the damage to his trade (i). And where the obstruction of light rendered the premises useless for his trade, the occupier was held entitled to compensation for removal to new premises for continuing his trade (k).

The reversioner of a tenement which is in the occupa- Reversioner. tion of a tenant may maintain an action for the disturbance of an appurtenant easement, if the disturbance be in its nature permanent, and injurious to the reversion either as depreciating its value or as affecting the title to the easement. The tenant may bring his action in respect of his possession, and the reversioner in respect of the injury

(g) Williams v. Morland, 2 B. & C. 910. (j) Eagle v. Charing Cross Ry., L. R. 2 C. P. 638; 36 L. J. C. P.

<sup>(</sup>h) Embrey v. Owen, 6 Ex. 253. (i) Wigram v. Fryer, 36 L. J. C. 87; 56 L. J. C. 1098; ante, p. 266.

<sup>(</sup>k) See The Queen v. Poulter, L. R. 20 Q. B. D. 132; 56 L. J. Q. B. 581.

done to the value of the inheritance (l). "The ground upon which a reversioner is allowed to bring his action for an obstruction, apparently permanent, to lights and other easements which belong to the premises, is, that if acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right" (m). Thus in a case of disturbance of ancient lights by a hoarding erected upon the servient tenement, it was held that the reversioner of the dominant tenement might maintain an action in respect of the hoarding being of a permanent character and operating in denial of the right (n). In the case of an action by the reversioner for obstructing a way by locking a gate, the Court said that the only question was whether the reversion could by any means be injured; that the permanent erection of a wall across the way would occasion such an injury, although the wall might be pulled down before the plaintiff was entitled to the possession; that there might be such a fastening of the gate as would amount to as permanent an obstruction as a wall, and that whether it was so under the circumstances was a question of fact and not an inference of law (o). In the case of an action by the reversioner of riparian land upon a natural stream, it was held that a detention of the water for the purpose of irrigation was a disturbance of the right, from which the law would infer damage to the reversion without further proof of actual damage (p). -If the obstruction is continued, the reversioner may bring repeated actions from time to time and may recover substantial damages assessed upon the ground of the continuance. In a first action the damages would usually be nominal, because the obstruction may be removed before the reversion comes into possession, and it cannot be pre-

Repeated actions for continuance of disturbance.

<sup>(</sup>l) Jesser v. Gifford, 4 Burr. 2141. (m) Per cur. Bower v. Hill, 1 Bing. N. C. 555; Shadwell v. Hutchinson, 2 B. & Ad. 97.

<sup>(</sup>n) Metropolitan Ass. v. Petch, 5 C. B. N. S. 504. See Cooper v.

Crabtree, L. R. 20 C. D. 589; 51 L. J. C. 544.

<sup>(</sup>o) Kidyill v. Moore, 9 C. B. 364; 19 L. J. C. P. 177.

<sup>(</sup>p) Sampson v. Hoddinott, 1 C. B.N. S. 590; 26 L. J. C. P. 148.

sumed to be permanent. In a subsequent action substantial damages may be given, because the continuance of the obstruction would be more injurious to the title; also it seems with the view of compelling the removal of it (q). And in such cases an injunction may be claimed (r). A reversioner can only claim damages for an injury that is permanent and that will endure when the property comes into possession (s).

The disturbance of an easement continued or threatened Injunction. may be restrained by injunction. By the Judicature Act, Statutory and 1873, s. 24 (7), "The High Court of Justice and the jurisdiction. Court of Appeal respectively, in every cause or matter pending before them respectively, shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to." Amongst these remedies are the remedy by injunction inherent in the equitable jurisdiction of the Court of Chancery, and the remedy by injunction given by the Common Law Procedure Act, 1854 (t).—By the Common Law Procedure Act, 1854, s. 79, "In all cases where the party injured is entitled to maintain and has brought an action he may claim a writ of injunction against the repetition or continuance of such injury, or the committal of any injury of the like kind relating to the same property or right; and he may also in the same action include a claim for damages or other redress."—And by sect. 81, "in such action judgment may be given that the writ of injunction do or do not issue, as justice may require."—By the Judicature Act, 1873,

<sup>(</sup>q) Shadwell v. Hutchinson, 2 B. & Ad. 97; Bathishill v. Recd, 18 C. B. 696; 25 L. J. C. P. 290.

C. B. 696; 25 L. J. C. F. 290.

(r) Clowes v. Stafford Potteries Co.,
L. B. 8 Ch. 142; 42 L. J. C. 112.

(s) Rust v. Victoria Dock Co.,
L. R. 36 C. D. 113.

(t) The Chancery Amendment
Act, 1858 (Lord Cairns' Act), en-

abling the Court of Chancery to

give damages in addition to or in substitution for injunction, was repealed by the Statute Law Revision Act, 1883; having been super-seded in effect by the Judicature Act, which gives each Division of the Court full power to give either an injunction or damages. Sayers v. Collyer, L. R. 28 C. D. 103; 54 L. J. Č. 3.

s. 25 (8), "An injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made: and any such order shall be made either unconditionally or upon such terms and conditions as the Court shall think just."-"The Court under these Acts has unlimited power to grant an injunction in any case where it would be right or just to do so; and what is right or just must be decided on settled legal principles" (t). "The phrase 'just or convenient' in the Judicature Act, 1873, s. 25 (8), does not extend or alter the principles on which the Court should act "(u).

Principle of granting injunction.

The general principle of granting injunction is that damages are an inadequate remedy for privation of the There are many cases in which a claim for damages would not support an injunction; but a claim to substantial damages would presumptively give a claim to an injunction, because the Court will not allow a person to act so as to injure another merely upon payment of a compensation in damages, if that other person prefers to enjoy his specific right instead of taking a compensation for it in the form of a compulsory assessment of damages (v). Court would not interfere by way of injunction in a case in which no damages could be recovered at law; nor in general, in a case in which, although damages might be recoverable, the amount would be inconsiderable "(w). But a right to nominal damages may be sufficient ground for an injunction in order to prevent future injury (x).— In the case of a covenant creating a special right of the nature of an easement, the Court would in general grant an injunction in the strict terms of the covenant without regard to the amount of damages, in exercise of the juris-

<sup>(</sup>t) Jessel, M. R., Beddow v. Beddow, L. R. 9 C. D. 93; 47 L. J. C.

<sup>(</sup>u) Per cur. Day v. Brownrigg, L. R. 10 C. D. 307; Gaskin v. Balls, L. R. 13 C. D. 324. (v) Wood, V.-C., Dent v. Auction Mart, L. R. 2 Eq. 246; 35 L. J.

C. 555. (w) Turner, L. J., Johnson v. Wyatt, 2 D. J. & S. 18; 33 L. J.

<sup>(</sup>x) Clowes v. Stafford Potteries Co., L. R. 8 Ch. 142; 42 L. J. C. 112; Pennington v. Brinsop Coal Co., L. R. 5 C. D. 773; 46 L. J. C. 774.

diction to enforce specific performance of the contract (x). But in a conveyance of land with appurtenant easements, the usual covenant for quiet enjoyment does not enlarge the rights conveyed or the claim for an injunction; it only gives the additional security of the covenant (y).

A mandatory injunction is an injunction requiring the Mandatory removal of buildings or other obstructions and easements injunction to after they have been completed; "the Court will not obstructions. interfere by way of mandatory injunction, except in cases in which extreme, or very serious damage will ensue from its interference being withheld" (z); and except in "cases where the injury done cannot be estimated and sufficiently compensated by a pecuniary sum "(a). "The comparative values of the defendant's building and the plaintiff's may be sufficient to induce the Court to refrain from granting an injunction in a case where, if the buildings had not been completed, an injunction would be granted" (b). The Court will also have regard to the nature of the obstructive building and whether or not it can be removed easily and without loss; the annoyance caused by it and how far the demand for its removal under the circumstances is reasonable; and generally the comparative consequences to the parties of the Court granting a mandatory injunction (c).—Delay or acquies- Delay or cence in suffering a building that obstructs lights or other acquiescence. easements to be substantially completed before making complaint is ground for the Court refusing a mandatory injunction (d). On the other hand, if notice has been

<sup>(</sup>x) Leech v. Schweder, L. R. 9 Ch. 463; 43 L. J. C. 487; Cooke v. Chilcott, L. R. 3 C. D. 694. (y) Leech v. Schweder, supra; Jenkins v. Jackson, W. N. 1888, p.

<sup>(</sup>z) Durell v. Pritchard, L. R. 1

<sup>(</sup>z) Durett v. Fritchara, L. R. 1 Ch. 250; 35 L. J. C. 223. (a) Westbury, L. C., Isenberg v. East India Ho. Co., 3 D. J. & S. 263; 33 L. J. C. 392. (b) Jessel, M. R., Aynsley v. Glover, L. R. 18 Eq. 554; 43 L. J.

C. 777; Kindersley, V.-C., Curriers' Co. v. Corbett, 2 Dr. & Sm.

<sup>(</sup>c) Baxter v. Bower, 44 L. J. C. 625; Bowes v. Law, L. R. 9 Eq. 636; 39 L. J. C. 483; Kelk v. Pearson, L. R. 6 Ch. 812; Goodson v. Richardson, L. R. 9 Ch. 223; 43 L. J. C. 790.

<sup>(</sup>d) Stanley v. Shrewsbury, L. R. 19 Eq. 616; 44 L. J. C. 389; Gaskin v. Balls, L. R. 13 C. D. 324.

given or an action commenced before the completion of the building, and there has been no previous delay or acquiescence, the Court will not refuse a mandatory injunction merely upon the ground that the building has been completed (e). "Acquiescence is distinguished from delay, for a shorter period is sufficient to bar the enforcement of rights in the case of acquiescence than in a case of mere delay"; also "an amount of acquiescence less than what would be a bar to all remedy may operate on the discretion of the Court and induce it to give damages instead of an injunction" (f). A stronger case of acquiescence is required to justify the Court in refusing to interfere at the hearing of a cause, which concludes the right, than is required upon an interlocutory application (g).

Interlocutory injunction.

The Court may grant an interlocutory injunction against continuing an obstruction pending the litigation respecting it, upon the applicant giving an indemnity against any loss occasioned by it; and if it turns out that the injunction was erroneously granted, the indemnity may be enforced, whether the error was in matter of fact, or that of the Court in matter of law (h). A mandatory injunction may be granted pending the litigation; and such an injunction was granted where the building was continued after an injunction to restrain building pending litigation (i).—The Court will not in general sanction a defendant continuing to build pending litigation upon the terms of pulling down if it be eventually decided against him, on account of the hardship that might be caused in enforcing such terms (j); but if such an undertaking has been

<sup>(</sup>e) Smith v. Smith, L. R. 20 Eq. 500; 44 L. J. C. 630; Krehl v. Burrell, L. R. 7 C. D. 551; 11 C. D. 146; 47 L. J. C. 353; Smith v. Day, L. R. 13 C. D. 651.

(f) Per cur. Sayers v. Collyer, L. R. 28 C. D. 103; 54 L. J. C. 3.

<sup>(</sup>g) Per cur. Johnson v. Wyatt, 2 D. J. & S. 18; 33 L. J. C. 397.

<sup>(</sup>h) Hunt v. Hunt, 54 L. J. C. 289; see Smith v. Day, L. R. 21 C. D. 421; Newby v. Harrison, 3 De G. F. & J. 287; 30 L. J. C. 863.
(i) Beadel v. Perry, L. R. 3 Eq.

<sup>(</sup>j) Jessel, M. R., Aynsley v. Glover, L. R. 18 Eq. 553; 43 L. J. C. 777.

given, it will be rigorously enforced and a mandatory injunction granted to pull down the building (k).

The above principles may be illustrated in application to Injunction to lights. There are many cases of disturbance of lights in protect lights. which an action may be maintained, but which will not support an injunction. The Court will in general grant an injunction only in cases where substantial damages can be proved (1). Hence "it is necessary, in order that an injunction should be granted, for the plaintiff to show that there will be a permanent obstruction to the access of light to such an extent as to render the occupation of his house less comfortable than it was before, or to prevent the present tenant from carrying on his business as beneficially as he could before; or that the plaintiff, as owner of the reversion, will suffer substantial or material damage by the lessening of its value" (m). If the obstruction of light would render the property practically useless, the owner will not be compelled to accept compensation in damages instead of an injunction; in cases of partial obstruction of light, it becomes a question more or less of discretion for the Court, to be exercised upon a knowledge of the facts of each particular case (n).—An injunction will in general be granted against raising a new building in a street to a greater height than would subtend an angle of forty-five degrees with the level of the lights in the houses on the opposite side of the street; as being presumptively a material obstruction to the light. And it is said that within that limit "there cannot, under ordinary circumstances, be such a material obstruction of light as to make

<sup>(</sup>k) Cotton, L. J., Eccles. Commiss. v. Kino, L. R. 14 C. D. 229; 49 L. J. C. 529; Smith v. Day, L. R. 13 C. D. 651; Greenwood v. Hornsey, L. R. 33 C. D. 471; 55 L. J. C.

<sup>(</sup>l) Eldon, L. C., Att.-Gen. v. Nichol, 16 Ves. 338; Wood, V.-C., Dent v. Auction Mart, L. R. 2 Eq. 245; 35 L. J. C. 555; Kino v. Rudkin, L. R. 6 C. D. 160; 46

L. J. C. 807.

<sup>(</sup>m) Johnson v. Wyatt, 2 D. J. & S. 18; 33 L. J. C. 394; Fry, J., Kino v. Rudkin, L. R. 6 C. D. 160; 46 L. J. C. 807; Kelk v. Pearson, L. R. 6 Ch. 809.

<sup>(</sup>n) Holland v. Worley, L. R. 26 C. D. 578; 54 L. J. C. 268; Greenwood v. Hornsey, L. R. 33 C. D. 471; 55 L. J. C. 917.

it necessary for the Court to interfere by way of injunction" (a).—In a case where it was doubtful whether a proposed wall would be a material obstruction to lights, the Court directed a temporary screen to be erected, and appointed a surveyor to report upon the effect (p).—An injunction may be granted though the house be unoccupied, in respect of the possible occupation (q). So, where a building has been pulled down, with intention of rebuilding and preserving the ancient lights (r); and where a building was pulled down with the intention of selling the site with all the rights appurtenant thereto, an injunction was granted against building upon the adjacent land so as to obstruct the light as originally enjoyed (s). If a house is about to be pulled down without re-building, as in the case of a house under notice to be taken for some public purpose, the Court would not grant an injunction, but would leave the owner to his remedy in damages (t).

Abatement of nuisance to easement.

The owner of the dominant tenement may himself abate a nuisance or obstruction to an easement. 'At common law "there are two ways to redress a nuisance one by action, and in that he shall recover damages and have judgment that the nuisance shall be removed or abated, as the case requires; or the party grieved may enter and abate the nuisance himself" (u). And he may abate the nuisance before any prejudice; "for it is reasonable that he should prevent his prejudice, and not stay till it be done" (v). The abatement of a nuisance by an act of the party himself merges his right of action and claim for

<sup>(</sup>o) City of London Brewery v. Tinnant, L. R. 9 Ch. 212; 43 L. J.

C. 457; ante, p. 214.
(p) Leech v. Schweder, L. R. 9
Ch. 463; 43 L. J. C. 487.
(q) Wilson v. Townend, 1 Dr. &
Sm. 324; 30 L. J. C. 25; ante, p. 215.

<sup>(</sup>r) Staight v. Burn, L. R. 5 Ch.163; 39 L. J. C. 289.

<sup>(</sup>s) Eccles. Commis. v. Kino, L. R. 14 C. D. 213; 49 L. J. C. 529. (t) Wood, V.-C., Dent v. Auction Mart, L. R. 2 Eq. 247. (u) 9 Co. 54 b, Baten's Case; per cur. Perry v. Fitzhowe, 8 Q. B. 775. (v) Penruddock's Case, 5 Co. 101 b.

damages (w).—Accordingly, "if a person builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down" (x). "A commoner may pull down a building wrongfully erected upon the common, and which prevents his exercising his right so fully as he might otherwise, provided he does no unnecessary damage" (y).

The owner of the servient tenement also may protect Abatement of his property from subjection to an easement by himself nuisance to abating a nuisance to it. If one builds a house over-tenement. hanging the house of another, or with caves that shoot the water upon the land of another, the latter may abate the nuisance and may pull down so much of the house as is necessary for that purpose (z). In the case of trees growing over the land of another, the latter may abate the nuisance at any moment by cutting the trees growing over his land (a). And the occupier of a tenement may enter upon adjoining land to remove a nuisance of filth which pollutes the air, and renders his tenement unwholesome (b).

Upon the same principle if an easement is used in excess Exercise of of the right, so as to impose an undue burthen upon the excess. servient tenement, the owner of the latter may obstruct the easement altogether, if he cannot otherwise prevent the excess; and the easement will then be suspended until reduced to the proper limits of use (c). Thus if a watercourse for the discharge of pure water is used to discharge foul water, the servient owner may stop it entirely; for "if a man has a right to send clean water through a drain and sends dirty water, every particle of the water ought to

<sup>(</sup>w) 9 Co. 55 a, Baten's Case.

<sup>(</sup>x) Rex v. Rosewell, 2 Salk. 459.

<sup>(</sup>y) Fer cur. Davies v. Williams, 16 Q. B. 546; 20 L. J. Q. B. 330. (z) Baten's Case, 9 Co. 53 b; Rex

v. Rosewell, supra.
(a) Morrice v. Baker, 3 Bulstr.

<sup>196,</sup> cited in Jones v. Williams, 11 M. & W. 178.

<sup>(</sup>b) Jones v. Williams, 11 M. & W.

<sup>(</sup>c) Per cur. Cawkwell v. Russell, 26 L. J. Ex. 36.

be stopped, because it is all dirty" (d). But if several persons have prescriptive rights of draining through a sewer of the servient tenement, and one or more of them exercise their rights in excess, there would be no justification on that account of stopping the sewer against all and thereby depriving those who are acting within their right (e). Whether a particular act be a proper and reasonable use of an easement, or such an excessive use as will render the act wholly wrongful, is a question of fact depending upon the circumstances (f).—This principle has no application to negative easements, because no act is done upon the servient tenement which the owner could abate; thus with the easement of light, enlarging the windows of a house cannot be treated as an excessive use of the easement; it is merely equivalent to opening new windows, which it is within the power of the owner to do without encroachment on the servient tenement. therefore gives no right to obstruct the ancient lights, though it may not be possible to obstruct the new openings without doing so (g).

Negative easement of light.

Notice to abate nuisance. As against an occupier who has himself wrongfully caused the nuisance the person aggrieved may enter upon his tenement and abate it without any notice or request to have it abated. But as against an assignee of the tenement with the nuisance upon it, and who is not himself the wrongdoer, a notice or request to abate it must, in general, be made before the party aggrieved can himself enter and abate it; unless the occupier is under some special obligation to remove the nuisance, the neglect of which would put him in the position of a wrongdoer and dispense with notice or request; and except in cases of danger to life or health from the nuisance which would justify immediate

<sup>(</sup>d) Cawkwell v. Russell, supra, (e) Jessel, M. R., Att.-Gen. v. Dorking, L. R. 20 C. D. 595; 51 L. J. C. 590. See Att.-Gen. v. Acton, L. R. 22 C. D. 221; 52 L. J. C. 108.

<sup>(</sup>f) Hawkins v. Carbines, 27 L. J. Ex. 44. See Williams v. James, L. R. 2 C. P. 577; 36 L. J. C. P. 256.

<sup>(</sup>g) Ante, p. 216.

abatement without notice. Also if the occupier increases an existing nuisance, it is equivalent to a new nuisance, and it may be abated without notice (h).—The right of abatement extends to pulling down a dwelling house, as well as any other building, provided that no person be therein at the time; but if there be any person in actual occupation, notice must be given to him and a request made to him to remove, before it would be justifiable to pull it down as a nuisance (i).

Abatement of a nuisance must be executed without Unnecessary doing unnecessary damage. Therefore if part only of a house or building be a nuisance that part only may be pulled down; but the person who is justified in pulling down part is not responsible for the consequences to the rest. As in the case of a person pulling down the part of a milldam which was wrongfully built upon his land, thereby causing the whole dam to fall down and the water to run out, the Court held him excused, adding that "if one erects a wall upon his own land and the land of his neighbour, and the neighbour pulls down the wall upon his land, and thereupon all the wall falls down, this is lawful "( i).

546; 20 L. J. Q. B. 330.

<sup>(</sup>h) Penruddock's Case, 5 Co. 101 b; Jones v. Williams, 11 M. & W. 176.

<sup>(</sup>j) Wigford v. Gill, Cro. Eliz. 269; per cur. Perry v. Fitzhowe, 8 Q. B. 775. See post, p. 369. (i) Perry v. Fitzhowe, 8 Q. B. 757; Davies v. Williams, 16 Q. B.

# CHAPTER II.

## PROFITS À PRENDRE.

Section I. Profits à prendre in general.

II. Creation of profits.

III. Extinction of profits.

IV. Remedies for profits.

### Section I. Profits à prendre in general.

Profits à prendre—in gross and appurtenant—conditions and limits of appurtenancy—land cannot be appurtenant to land.

Licence to get minerals—to cut trees and turf—to take game and fish —to take water.

Pasture of land-herbage of land.

Commons—common of pasture—in gross—appurtenant—cattle levant and couchant—stinted commons—unstinted commons—sheep walk—pannage.

Common appendant—commonable cattle.

Common of vicinage-inclosure.

Common fields-lammas lands.

Common of estovers-common of turbary.

Common of copyholders-profits of copyhold tenement.

Rights of common of lord-statutory compensation.

Profits à prendre.

Profits à prendre are rights in the land of another which consist in the taking of some material profit from the land. They may be claimed as rights in gross, or in some cases as appurtenant to a dominant tenement over a servient tenement in the manner of easements.

In gross and appurtenant.

An easement, strictly so called, cannot be claimed in gross, or otherwise than as appurtenant to land; for if not appurtenant to a dominant tenement, it would be a mere licence personal to the licensee and revocable at will. But profits of land may be granted to be held in gross

independently of other land; and the licence or easement, which is an implied accessory of such grant, to enter upon the land for the purpose of taking the profits granted, becomes by reason of the grant, if validly made, irrevocable (a).—The effect of appurtenancy is that the profit to be taken in the servient tenement passes inseparably with the dominant tenement for any estate, and by any mode of conveyance sufficient to pass the tenement (b). Also a profit granted as appurtenant to a tenement passes by descent with the inheritance of the tenement; a profit granted in gross passes to the heir of the grantee as a separate inheritance (c).

Profits can only be made appurtenant to a tenement as Conditions being beneficial to the occupation in some manner that and limits of appurteserves to define and limit the right. "In all cases of a nancy. claim of right in alieno solo as appurtenant, such claim must be made with some limitation and restriction. the ordinary case of common appurtenant the right cannot be claimed for commonable cattle without stint and to any number; but such right is measured by the capacity of the dominant tenement to maintain the cattle during the winter. Again, in the case of common of estovers or a liberty of taking wood, called in the books house bote, plough bote, and hay or hedge bote, such liberty is not wholly vague and indeterminate, but confined to some certain and definite use; as for the maintenance and carrying on of husbandry, for fuel, for repairing of the house, the instruments of tillage and the necessary fences of the tenement" (d). Thus a claim cannot be made in right of occupancy of a tenement to cut turf upon land for sale, without restriction to the requirements of the tenement (e); or a claim to cut turf as much every year

<sup>(</sup>a) See ante, p. 197; post, p. 348. (b) Sacheverill v. Porter, Cro Car. #82; Drury v. Kent, Cro. Jac. 14; Daniel v. Hanslip, 2 Lev. 67; see Bailey v. Stevens, 12 C. B. N. S. 91; 31 L. J. C. P. 226.

<sup>(</sup>c) 8 Co. 54 a, Sym's Case.

<sup>(</sup>d) Per cur. Clayton v. Corby, 5 Q. B. 419; Willes, J., Bailey v. Stevens, 12 C. B. N. S. 91; 31 L. J. C. P. 229; Morley v. Clifford, 51
 L. J. C. 687; L. R. 20 C. D. 753. (e) Valentine v. Penny, Noy. 145.

as two men can cut in a certain time, without alleging it to be spent in the house (f); or a claim to cut turf for the improvement of the tenement as often and in such quantity as occasion required (g); or a claim as appurtenant to a close to cut down all trees growing on another close and to dispose of them without any restriction (h). And upon this principle it was held that a claim to dig clay for making bricks at a brick kiln, as occasion required and without limit or restriction, could not be supported as appurtenant to the kiln (i).

Land cannot be appurtenant to land.

Rights claimed as appurtenant must not extend to all the uses and profits of which the servient land is capable, for the claim would then be equivalent to ownership of the soil; and land cannot be claimed as appurtenant to other land, but must be held by distinct title (j). Accordingly an allotment of land given in lieu of appurtenant rights extinguished by an Inclosure Act does not become appurtenant to the original tenement, but is an independent property (k). Nor can a profit à prendre be claimed as appurtenant to another right of the like kind; a right of common cannot be appurtenant to another right of common (l). But a licence to use land by way of easement may be granted as accessory to a grant of a profit à prendre and would be irrevocable (m).—Profits to be taken from the land of another, that do not satisfy the legal conditions of appurtenancy in relation to a dominant tenement, may be held as rights in gross, provided they are capable of being the subject of a grant (n).

The following are the principal species of profits à

<sup>(</sup>f) Hayward v. Cannington, 2 Keble, 290; 1 Levinz, 231. (g) Wilson v. Willes, 7 East, 121. (h) Bailey v. Stevens, 12 C. B. N. S. 91; 31 L. J. C. P. 226. (i) Clayton v. Corby, 5 Q. B. 415. See Att.-Gen. v. Mathias, 27 L. J. C. 766; 4 K. & J. 579. (j) Co. Lit. 121 b; 4 Co. 36 b, Thereivelband's Case : Loves v. Richard

Tyrringham's Case; Jones v. Richard,

<sup>5</sup> A. & E. 413; Buszard v. Capel, 8 B. & C. 141; 6 Bing. 150. (k) Williams v. Phillips, L. R. 8 Q. B. D. 437; 51 L. J. Q. B. 102. (l) Mill v. Commiss. of New Forest, 18 C. B. 60; 25 L. J. C. P. 215

<sup>(</sup>m) Ante, p. 327, n. (a). (n) Ante, p. 326.

prendre - "The grant of a licence to search and get (irrevocable on account of its carrying an interest), with a grant Licence to get of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest. grantee has no estate or property in the land itself, or any particular portion thereof, or in any part of the ore or minerals ungot therein; but he has a right of property only as to such part thereof as upon the liberties granted to him should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines or minerals in the land "(o). In like manner a licence or right to enter upon land and to dig and carry away stone, gravel, sand, or other material of the soil, is a profit à prendre. And a licence to take cinders from a heap which had become a part of the soil was held to be a right of this kind (p).—The grant of a licence to search for and take minerals creates a right in gross, assignable, demisable, and descendible (q). Such a licence may be granted to one Exclusive and person exclusively of others, or to several persons concurrently. As it gives no specific property in the profits until taken, it is presumptively not exclusive of the owner, or of other licensees; if intended so to be, it must be so expressed. The owner of the land may grant similar licences to others, so far as he can without derogation from his former grant, or he may himself take similar profits while the land is in his possession, or he may grant or demise the land to another subject to the licence (r). A licence differs from a lease in this respect that the licence gives no specific right to the profits before actually taken into possession by virtue of

<sup>(</sup>o) Per cur. Doe v. Wood, 2 B. & Ald. 738; Muskett v. Hill, 5 Bing. N. C. 706; ante, p. 63.
(p) Smart v. Jones, 15 C. B. N. S. 717; 33 L. J. C. P. 154.

<sup>(</sup>q) Muskett v. Hill, 5 Bing. N. C. 694; Willes, J., Bailey v. Stevens,

<sup>31</sup> L. J. C. P. 228; 12 C. B. N. S.

<sup>(</sup>r) Mountjoy's Case, Co. Litt. 164 b; Dowglass v. Kendal, Cro. Jac. 256; Chetham v. Williamson, 4 East, 469; ante, p. 54.

the licence; while a lease gives immediate possession of the whole subject of demise, leaving nothing of which a concurrent lease or licence can be granted. As to a licence it is said "that a man taking a licence where he is under no obligation to work cannot exclude his licensor from granting as many more of those licences as he thinks fit, provided always that they are not so granted as to defeat the known objects of the first licensee" (s).

Licence to take trees and turf.

fish.

Game and

A grant of the trees and underwood of all kinds growing and to grow in future in a certain wood, (except the land and soil of the same wood,) with liberty to inclose for the preservation of the wood, was held to give "an inheritance as profit apprender in alieno solo" (t).—So, a sole and exclusive right to dig turf and peat from a moss in the waste of a manor (u).—The right to kill and take game in certain land, also rights of fishery in private waters, may be granted as separate tenements in gross and for the same limitations of estate as land. These rights have been already noticed (r). It seems that such rights cannot be claimed as appurtenant, because they cannot be subservient to or limited by the use of a dominant tenement; they are rights of mere personal profit and enjoyment. Free warren as an ancient franchise may be prescriptively appurtenant to a manor; but a grant of a manor accompanied with a grant of warren would not make it so. "A warren appendant or appurtenant can exist only by prescription" (w).

Water.

But a right to enter upon land of another to take water from a running stream or spring, is a mere easement and not a profit à prendre (x). So also is a right to use the

<sup>(</sup>s) Wood, L. J., Carr v. Benson, L. R. 3 Ch. 532. (t) Barrington's Case, 8 Co. 136 b; Bailey v. Sterens, 12 C. B. N. S. 91; 31 L. J. C. P. 229; ante, p. 30. (u) Wilson v. Mackreth, 3 Burr.

<sup>1824.</sup> 

<sup>(</sup>v) Ante, pp. 78, 175; Moore v. Lord Plymouth, 7 Taunt. 614; Rex v.

Piddletrenhide, 3 T. R. 772; Shuttleworth v. Le Flenung, 19 C. B. N. S. 687; 34 L. J. C. P. 309.
(w) Morris v. Dimes, 1 A. & E. 654; Beauchamp v. Wunn, L. R. 6 H. L. 223; ante, p. 85.
(x) Race v. Ward, 4 E. & B. 702; 24 L. J. Q. B. 153.

water of a pond for watering cattle and for domestic purposes (y); and the right to take water from a pump (z). For water, it is said, "is no part of the soil like sand or clay or stones, nor the produce of the soil, like grass or turves or trees; it is supplied and renewed by nature" (a). Hence a claim to take water from a natural stream or spring in the land of another may be supported by local custom (b).

A right to the sole and exclusive pasture over the land Pasture of of another may be vested in gross in a man and his heirs, for an estate analogous to a fee simple; it may be claimed by grant or by prescription at common law; it is also assignable for the same or for any less estate (c). A right of sole pasture is a tenement within the statute De Donis and may be entailed (d). It may be granted and held as a tenement by copyhold (e). It may be demised with a reservation of rent, and the lessor may distrain the cattle pasturing upon the land (f).—A similar grant may be Herbage of made of the herbage or vesture of land, vestura terra, including the crops of grass, underwood, brushwood and litter growing upon the land to be cut and taken away. and not, like pasture, only to be fed off by cattle; but without any right or interest in the soil beyond the necessary easement of entering upon the surface to take the profits granted (g). A grant of such profits may be limited to a certain season of the year as from Lammas to Candlemas; or it may be limited to the first crop, prima

<sup>(</sup>y) Manning v. Wasdale, 5 A. & E. 758.

<sup>(</sup>z) Pomfret v. Ricroft, 1 Wms. Saund 321.

<sup>(</sup>a) Per cur. Race v. Ward, supra.

<sup>(</sup>b) See post, p. 563. (c) Welcome v. Upton, 6 M. & W. 536. "Instances of sole pasturage are to be found in the South Downs in Sussex, and they are frequently tran-ferred in gross. It is the same with the cattle-gates in the North of England, although some have

thought the owners of them are tenants in common of the soil." Abinger, C. B., ib. Bennington v. Goodtitle, 2 Strange, 1084; The King v. Whixley, 1 T. R. 137; Lons-dale v. Rigg, 11 Ex. 654; 1 H. & N. 923.

<sup>(</sup>d) Co. Lit. 20a.

<sup>(</sup>e) Co. Lit. 58b; Hoe v. Taylor, 4 Co. 30b.

<sup>(</sup>f) Co. Lit. 47a. See Masters v. Green, L. R. 20 Q. B. D. 807. (g) Co. Lit. 4b.

tonsura, excluding all other rights and profits (h).—The grantee of exclusive pasture, or of the herbage or vesture of land has possession of the surface for the time being so far as is necessary for taking the profits granted, and he can maintain an action of trespass in right of that actual possession. The owner of the soil subject to such exclusive possession of the surface is excluded from maintaining an action for a trespass upon the surface only; but he retains the right of action for a trespass to the subsoil (i). An exclusive use of pasture in absence of other facts indicative of ownership is primâ facie evidence of title to the land itself; and the inference is stronger where the nature of the land is such as not to admit of other profitable uses (j).—The terms "pasture," "meadow," or other like term in a conveyance may be construed as a description of the

Construction of terms.

a conveyance may be construed as a description of the land sufficient to pass the land itself; or it may be construed to mean only the profit of pasturing cattle, whilst the land itself in respect of all other uses remains the property of another. The construction depends primarily upon the context of the instrument in application to the circumstances; and if doubtful it may further be explained by the usage in which it has been accepted (k).

"Common" is used as a general expression for "a

Commons.

"Common" is used as a general expression for "a profit which a man hath in the land of another"; the common interest being between the owner of the profit and the owner of the soil, or between the owner of the profit and other owners of like profits; and in the latter case it may be exclusive of the owner of the soil. There are various species of commons:—of pasture, of estovers, of turbary, of pischary, of digging for coals, minerals, and the like (1).

(h) Co. Lit. 58 b; Stammers v. Dixon, 7 East, 200; Johnson v. Barnes, L. R. 8 C. P. 527; 41 L. J. C. P. 250.

1 Wms. Saund, 349 b.

<sup>(</sup>i) Co. Lit. 4 b; Cox v. Glue, Cox v. Mousley, 5 C. B. 533; Coverdale v. Charlton, L. R. 4 Q. B. D. 104; 48 L. J. Q. B. 128.

<sup>(</sup>j) Jones v. Richard, 5 A. & E. 413.

<sup>(</sup>k) Co Lit. 4 b; Stammers v. Dixon, 7 East, 200; Doe v. Bevis, 7 C. B. 504; Mogg v. Yatton, L. R. 6 Q. B. D. 10; 50 L. J. M. 17. (l) Co. Lit. 122 a; Potterv. North,

Common of pasture is the right of feeding beasts on Common of another's land; and it is so called "for that the feeding of pasture. beasts in the land wherein the common is to be had belongs to many" (m). Common of pasture can be taken only by putting cattle upon the land to eat the herbage; thus differing from a right to the herbage of land which may be taken by cutting it and carrying it away to use elsewhere for food, litter, or manure (n).—Common of pasture In gross. may be in gross, or appurtenant. Common of pasture in gross may be claimed by grant or by prescription at common law. It is defined and limited by the express terms of the grant, or by the mode of use and enjoyment upon which the prescription is founded. It may be of any kind that is capable of being made the subject of a grant (o).

Common of pasture appurtenant is claimed as an inci- Common of dent annexed to a dominant tenement, and is defined and pasture appurtenant. limited, directly or indirectly, by some beneficial connection with the occupation of that tenement (p). It may be limited to the cattle "levant and couchant" upon the dominant tenement, or to the cattle required for ploughing and manuring the tenement, or to cattle of a certain species, or it may be "stinted," that is limited to a certain number of cattle, either fixed absolutely or by reference to the value or extent of the tenement (q).—The phrase Cattle levant "levant and couchant" literally imports that the cattle should be permanently kept upon the land; but it is construed in modern times to refer to the capacity of the tenement to maintain the cattle rather than as a condition to be literally satisfied. "It is settled that what is meant by cattle levant and couchant is the number of cattle which the land in respect of which the common is claimed will maintain, and that it is a mode of admeasuring the

<sup>(</sup>m) Co. Litt. 122 α. (n) Ante, p. 331; De la Warr v. Miles, L. R. 17 C. D. 535; 50 L. J. C. 754.

<sup>(</sup>o) Ante, p. 326. (p) Ante, p. 327.

<sup>(</sup>q) Baylis v. Tyssen-Amhurst, L. R. 6 C. D. 507; 46 L. J. C. 718,

common" (r). So long as the tenement retains the capacity for maintaining the cattle the appurtenant common may continue, although in fact no cattle are kept upon it and the tenement is used for other purposes; thus where the tenement had been partly built upon and the rest turned into orchard ground, it was held to be not such a change of the dominant tenement, in respect of the capacity for maintaining cattle, as would prove an abandonment or loss of the pre-existing right of common (s). But the claim cannot be supported as appurtenant to a house only, without any land or curtilage on which the cattle could be kept (t). A claim of common for cattle levant and couchant upon a "cottage" was formerly held good, because a cottage with less than four acres of land was against the statute 31 Eliz. c. 7 (repealed 15 Geo. III. c. 32)(u).

Stinted commons.

Common appurtenant may be "stinted" or limited to a fixed number of cattle, as common for a certain number of cows, or oxen, or sheep, or horses (v); "there is no difference when the prescription is for cattle levant and couchant, and when for a certain number of cattle levant and couchant; but when the prescription is for common appurtenant to land without alleging that it is for cattle levant and couchant, there a certain number of cattle ought to be expressed, which are intended by the law to be levant and couchant" (w). Common may also be stinted to a number proportioned to the annual value of the tenements (x); or to a number proportioned to the extent of the tenements, as for a certain number per acre (y). And it seems there may be common for a share

<sup>(</sup>r) Per cur. Cheesman v. Hardman, 1 B. & Ald. 711; Parke, B., Whitelock v. Hutchinson, 2 M. & Rob. 205.

<sup>(</sup>s) Carr v. Lambert, L. R. 1 Ex. 176; 34 L. J. Ex. 68.

<sup>(</sup>t) Scholes v. Hargreaves, 5 T. R. 46: Benson v. Chester, 8 T. R. 396; Ricketts v. Salwey, 2 B. & Ald. 360.
(u) Emerton v. Selby, 6 Mod. 115.

<sup>(</sup>v) Holt, C. J., Richards v. Squibb,

<sup>1</sup> Ld. Raym. 726.

<sup>(</sup>w) Morse v. Webb, 13 Co. 66; Cheesman v. Hardham, 1 B. & Ald.

<sup>(</sup>x) Fox v. Amhurst, L. R. 20 Eq. 403; 44 L. J. C. 666; Boylis v. Tyssen- Amhurst, L. R. 6 C. D. 509.

<sup>29000-24</sup>mruno, D. R. 0 C. D. 509. (y) Hall v. Harding, 4 Burr. 2426; Hall v. Byron, L. R. 4 C. D. 667; Cheesman v. Hardham, 1 B. & Ald. 706.

or fractional part of an animal, to be enjoyed by joining with other commoners having similar rights, or by pasturing a whole animal for a fractional part of the year (z). Stints or measures of this kind may be imposed by the tenants or commoners themselves by virtue of customary or statutory powers to fix the stint (a); or by agreements, which however bind only the commoners for the time being who consent (b).—Common appurtenant not otherwise stinted is presumptively stinted to cattle levant and couchant upon the tenement (c). A grant of a tenement "together with reasonable common of pasture" was construed to mean pasture for cattle levant and couchant, that being the usual and therefore the reasonable measure of common appurtenant (d).

Pasture without stint or limit, of number or otherwise, Unstinted cannot be claimed as appurtenant to a tenement, but only pasture. as a right in gross, which may be created and assigned by deed (e). An exclusive right of pasture may be held by a corporate borough in gross; but to be enjoyed by the burgesses under the usual restrictions of common rights inter se, such as that of cattle levant and couchant upon their respective tenements (f).—An unstinted pasture or an exclusive right of pasture may be exercised by agisting or taking in to feed the cattle of a stranger; because it is immaterial to the owner of the land, who retains no interest in the pasture. And a common of pasture stinted to a certain number may be exercised by feeding the

<sup>(</sup>z) See Nichols v. Chapman, 5 H. & N. 643; 29 L. J. Ex. 461; Ellard v. Hill, Siderfin, 226.

<sup>(</sup>a) Fox v. Amhurst, supra; Baylis v. Tyssen-Amhurst, supra; 13 Geo. 3, c. 81.

<sup>(</sup>b) Chapman v. Cowlan, 13 East,

<sup>(</sup>c) Benson v. Chester, 8 T. R. 396; Chapman v. Cowlan, 13 East, 10; Powell v. Powis, 1 Y. & J. 161; Jones v. Richard, 6 A. & E. 530; Morley v. Clifford, L. R. 20 C. D. 757; 51 L. J. C. 687.

<sup>(</sup>d) Doidge v. Carpenter, 6 M. &

<sup>(</sup>e) Weekly v. Wildman, 1 L. Raym. 407; Ivatt v. Mann, 3 M. & G. 691; Morley v. Cl. fford, L. R. 20 C. D. 753; 51 L. J. C. 687; Welcome v. Upton, 6 M. & W.

<sup>(</sup>f) Johnson v. Barnes, L. R. 8 C. P. 527; 41 L. J. C. P. 250; The King v. Churchill, 4 B. & C. 750; Mellor v. Spateman, 1 Wms. Saund. 346d.

cattle of others, provided there be no surcharge (f), or it may be assigned altogether (g). Common appurtenant for cattle levant and couchant cannot be used for feeding the cattle of others; unless such cattle are hired and kept by the commoner as his own (h).

Sheep-walk.

A common of pasture may be claimed for a certain species of animals only, as for sheep, which is known as a "sheep walk," and under certain circumstances as a "fold course" (i). In ancient times it was commonly subject to "foldage," or the obligation of folding the sheep upon the demesnes of the manor for the benefit of manuring the land (j); a similar right of "foldage" was sometimes exacted from the tenants of a manor, as a service of their tenure (k).—Common of "pannage" is the right of feeding swine in woods and forests with the acorns and beech mast fallen from the trees. In ancient times it was frequently the subject of grant or of manorial custom; and in some places it is a valuable right at the present day. It gives no specific right or interest in the growing trees, or to take the produce from them, or to restrain the owner from cutting them for timber or from lopping them in the proper course of management (l).

Common appendant.

The earliest form of common appurtenant is the common of pasture appendant to arable land at common law. Upon the grant of a close of arable land by the lord of a manor before the Statute of Quia Emptores, there was appended by general custom or common law the right of pasturing upon the wastes of the manor the cattle that were neces-

Pannage.

<sup>(</sup>f) 2 Wms. Saund. 327, Hoskins v. Robins.

<sup>(</sup>g) Daniel v. Hanslip, 2 Lev. 67; Drurg v. Kent, Cro. Jac. 14.
(h) Per cur. Bennett v. Recrc, Willes, 232; Jones v. Richard, 5 A. & E. 530.

<sup>(</sup>i) Jones v. Richard, 5 A. & E. 413; 6 Ib. 530; Robinson v. Duleep Singh, L. R. 11 C. D. 798; 48 L. J. C. 758.

<sup>(</sup>j) Brook v. Willet, 2 H. Bl.

<sup>(</sup>k) 8 Co. 125b; Punsany v. Leader, 1 Leon. 11; Robinson v. Duleep Singh, L. R. 11 C. D. 810. (l) Chilton v. Corp. of London, L. R. 7 C. D. 562; 47 L. J. C. 433; Bracton, l. iv., c. 38, cited in De la Warr v. Miles, L. R. 17 C. D. 535; 49 L. J. C. 479.

sary for ploughing and manuring the land inclosed. After the Statute of Quia Emptores a grant of manorial land took the land out of the manor altogether as regards the tenure; for the grantee by force of the statute held directly of the superior lord and not of the manor, and therefore the incident of common appendant no longer attached (m). "Common appendant is of common right and therefore a man need not prescribe for it"; but by reason of its early origin it necessarily imports a prescriptive title, and hence it is said that "appendants are ever by prescription, but appurtenants may be created at this day" (n).—Common appendant can be claimed for arable land only, or at least for land originally arable; it cannot be claimed as originally granted for a house, or for meadow pasture land. But "if a man has had common for cattle which serve for his plough appendant to his land, and perhaps of late time an house is built upon part and some part is employed to pasture and some for meadow, in this case the common remains appendant; it shall be intended, in respect of the continual use of the common, at the beginning all was arable; but in pleading he ought to prescribe to have it appendant to land; and although now it is pasture or meadow, yet it is arable, id est, may be ploughed" (o).

Common appendant is limited to "commonable cattle," Commonable that is, cattle that serve for the maintenance of arable land, namely, horses and oxen to plough the land, and cows and sheep to manure it. Common appurtenant by grant or prescription has no such limits, but may extend to swine, goats, geese, and the like, according to the terms of the grant or the prescriptive usage; it is limited only by the condition of being appurtenant to the tenement (p).

<sup>(</sup>m) Co. Litt. 122a; 2 Inst. 85; 4 Co. 37a, Tyrringham's case; Warrick v. Queen's Coll., L. R. 6 Ch. 716; 40 L. J. C. 780. (n) Co. Lit. 121b, 122a; Hargrave's note, ib.

<sup>(</sup>o) Tyrringham's case, 4 Co. 37b; Carr v. Lambert, L. R. 1 Ex. 168; 34 L. J. Ex. 66; ante, p. 334. (p) Co. Lit. 122 a; 4 Co. 37 a, Tyrringham's case; per cur. Dun-raven v. Llewellyn, 15 Q. B. 810.

The grant of a tenement with the common law incident of common appendant may also have other profits appurtenant to it; which may be evidenced by the terms of the grant or by prescriptive use (q). A claim of common for all commonable cattle may be supported by evidence of the commoner turning out all kinds of commonable cattle that he kept, though he had never kept any sheep (r). -The commonable cattle must be levant and couchant upon the land; but this condition here imports no more than the connection of the cattle with the land which is necessary for ascertaining the number. "The tenant can only have a right of common for such cattle as are levant and couchant on his estate, that is, for such and so many as he has occasion for to plough and manure his land in proportion to the quantity thereof" (s). "The right of common appendant is confined to arable land only, and yet the party must state in claiming this right, that the cattle were levant and couchant upon the land; it follows therefore that arable land in point of law may have cattle levant and couchant thereon "(t).

Common of vicinage.

Common pur cause de vicinage, or intercommoning, is where adjacent commons are open and unfenced, and there is a local custom for the cattle to intercommon, that is, for the cattle rightfully put upon one common to stray and feed upon the other. The commoners of one common have no right to turn out cattle upon the other, "but they must escape thither of themselves by reason of vicinity. In which case one may inclose against the other, though it hath been so used time out of mind, for that it is but an excuse for trespass" (u). "The substance of the custom is that cattle lawfully on one common have been used to stray upon the other. All that is necessary therefore for

<sup>(</sup>q) Warrick v. Queen's Coll., L. R. 6 Ch. 726; 40 L. J. C. 780. (r) Mainfold v. Pennington, 4 B. & C. 161.

<sup>(</sup>s) Bennett v. Reeve, Willes, 231. (t) Per cur. Cheesman v. Hardham, 1 B. & Ald. 710.

<sup>(</sup>u) Co. Lit. 122 α; 4 Co. 38 b Turringham's case.

the pleading to show is that the cattle were lawfully on their own common before they strayed." The custom may be proved by immemorial usage of cattle straying and feeding upon the commons of vicinage, or by reputation; and the evidence of cattle straying may be met by proof that they were constantly driven back. The right of a commoner to his own common, to which the common of vicinage is incident, is not necessarily immemorial, but may be claimed by grant or by modern prescription under the Prescription Act (v). The commoners are restricted, as to the number and kind of cattle, by their rights upon their own respective commons, without respect to the extent of the common of vicinage; "for the original cause of this common for cause of vicinage was not for profit, but for preventing of suits"; and "if all the cattle feed promiscue together through the whole, it will be no prejudice to one or the other "(w). In case of surcharging the common of vicinage a commoner of the latter may bring an action upon the case; but he cannot determine the question for himself by distraining or driving off the cattle in excess (x). Common of vicinage cannot extend through the adjacent common to commons beyond; it is a mutual right between adjacent commons only, and it seems is restricted to two commons (y).—No similar custom can arise between two tenements held in several and exclusive ownership over which there are no commons; nor between commoners and an adjoining unfenced tenement over which there is no common; nor between a separate tenement and a common; the claim being in derogation of the general exclusive ownership of land, "the general principles of law require that it should be shown to arise by grant or prescription "(z).

<sup>(</sup>v) Prichard v. Powell, 10 Q. B. 603; Heath v. Elliott, 4 Bing. N. C. 388; Clark v. Tinkler, 10 Q. B. 604.

<sup>(</sup>w) 7 Co. 5 b, Corbet's case. (x) Cape v. Scott, L. R. 9 Q. B. 269; 43 L. J. Q. B. 65.

<sup>(</sup>y) Bronfield v. Kirber, 11 Mod. 72; Commiss. of Sewers v. Glasse, L. R. 19 Eq. 134; 44 L. J. C. 129. (z) Jones v. Robin, 10 Q. B. 637; Clarke v. Tinkler, 10 Q. B. 604; Heath v. Elliott, 4 Bing. N. C. 388;

Whilst the custom prevails the commoners cannot drive out the cattle straying on to their common, but must suffer them to be there; their only remedy is to extinguish the mutual rights by inclosure (a); but "a commoner may go on to a common of vicinage to drive his cattle off into his own common, for he ought not to keep them in the common of vicinage, and he may justify this trespass" (b). -Common of vicinage may be extinguished at any time by inclosure of one of the commons in a manner to prevent the straying of cattle from the other common. private Inclosure Act had extinguished the rights over one of the commons and allotted it into separate tenements, but no inclosure had in fact been made under it; it was held that the private Act did not affect the rights of the other commoners, who might continue their common of vicinage until prevented by an inclosure in fact (c). Where an inclosure was made of one of the commons leaving only a passage for a highway across the commons, it was held that as the inclosure and separation were not complete the common of vicinage was not in fact excluded (d).

Inclosure.

Common fields.

There is a species of intercommoning still prevailing in some places, where arable land is held by several persons in small parcels intermixed and uninclosed, with the right appendant by custom to each parcel to have common over the whole when the crops are off, for such commonable cattle as are required to plough and manure the land. The fields of arable land held in this manner are called "common fields," and the common is known locally by the term "common of shack" (e). "Common fields" are said to be the remains of a mode of holding and cultivating land prevalent in ancient times; they were of frequent occurrence until they were for the most part inclosed

<sup>(</sup>a) Co. Lit. 122 a; per cur. Jones v. Robin, 10 Q. B. 630. (b) Holt, C. J., Bromfield v. Kirber, 11 Mod. 72.

<sup>(</sup>c) Wells v. Pearcy, 1 Bing. N. C.

<sup>(</sup>d) Gullett v. Lopes, 13 East, 348. (e) Corbet's case, 7 Co. 5 a; Cheesman v. Hardham, 1 B. & Ald. 710.

under modern Inclosure Acts. Evidence of reputation is admissible to prove the custom, as it concerns the rights of all persons interested in the common field (f). By custom a freeholder in the common field may inclose his parcel and so exclude the other freeholders from common; and at same time as a consequence in law he excludes himself from common over the other uninclosed lands (q). The times for opening and closing the common may be fixed by custom, or by agreement of the freeholders; and in general the commoners may put in cattle at the proper time, although the crops are not wholly gathered (h). Powers for the better cultivation, improvement and regulation of common arable fields were given to the occupiers by the statute 13 Geo. III. c. 81. And powers to inclose such fields and to extinguish the right of intercommonage have been given by the statutes 6 & 7 Will. IV. c. 115, and 8 & 9 Vict. c. 118 (the General Inclosure Act).—The Lammas intercommoning of "Lammas lands" is of a similar kind. lands. These are meadows or pasture lands held in exclusive possession during the season of the year for taking the first crop, and open to common pasture during the rest of the year, generally from Lammas to Candlemas; the number of cattle being restricted to those levant and couchant upon the dominant tenements, or according to a stint or number regulated by custom or by the commoners (i).

Common of estovers is the profit of taking wood and Common of other materials necessary for the maintenance and supply estovers. of a house or land, including what are known by the terms

(f) Weeks v. Sparke, 1 M. & S.

500; 46 L. J. C. 718; Nichols v. Chapman, 5 H. & N. 643; 29 L. J. Ex. 461. The Act for correcting the calendar, 24 Geo. 2, c. 23, s. 5, advanced the date for opening commons of the above kind by eleven days, to compensate for the days taken out of the calendar: so that Lammas or 1 August became 12 August for that purpose.

<sup>(</sup>g) Corbet's case, supra; Hickman v. Thorn, 2 Mod. 104; Barber v. Dixon, 1 Wils. 44; How v. Strode, 2 Wils. 269.

<sup>(</sup>h) Year Book, 21 Hen. VI.,

cited 2 Leon. 202. (i) Fox v. Amhurst, L. R. 20 Eq. 403; 44 L. J. C. 666; Baylis v. Tyssen-Amhurst, L. R. 6 C. D.

house-bote, plough-bote, cart-bote and hedge-bote. These terms have been already explained with reference to the common law right of a tenant for life or for years to take the estovers from his own tenement. Common of estovers is the right of taking similar things to the same extent from the land of another (j). The right of estovers may extend by grant or custom to other materials required for the use or repair of the tenement, as cutting and taking litter for the use of the cattle kept upon the tenement (k), and taking sand, gravel, stone, clay and the like; in such cases the occupier in order to justify the exercise of his right must prove the want of repair or other necessity, and that he entered for the purpose of taking the material in question, and that he applied it to the required purpose (1). Common of estovers of the above kinds over the wastes of a manor is a frequent incident of the tenements of the manor, both freehold and copyhold. The right of a tenant at common law to take estovers without impeachment of waste is not a profit à prendre in the land of another, being a profit of his own tenement, and is subject to the terms of his lease. So the customary rights of copyholders to take profits from their own tenements, as to dig gravel, sand, and the like, are not profits à prendre (m).

Common of turbary.

Common of turbary is the right to cut turf for fuel. may be appurtenant to a house to be consumed therein for necessary fuel; and it then passes in a conveyance of the house without special mention. But it cannot be appurtenant to land, merely as open land, because not applicable thereto (n). It may be granted as a right in gross (o). a case under an Inclosure Act it was held that the occupiers of certain ancient tenements for the time being were entitled to common of turbary by way of a charitable

<sup>(</sup>j) Ante, p. 36; 2 Blackst. Com. 35.

<sup>(</sup>k) Bean v. Bloom, 2 W. Bl. 926; 3 Wils. 456; De la Warr v. Miles, L. R. 17 C. D. 535; 50 L. J. C. 754. (l) Peppin v. Shakespear, 6 T. R.

<sup>(</sup>m) Hanmer v. Chance, 4 D. J. & S. 626; 34 L. J. C 413. (n) Co. Lit. 121 b; 4 Co. 37 a, Tyrringham's Case; see Solme v. Bullock, 3 Levinz, 165.

<sup>(</sup>o) See Wilson v. Mackreth, 3 Burr. 1824.

trust, and not as a right appurtenant to the tenements or giving any interest to the owners of the tenements beyond enhancing the value of the occupation (p).

In copyhold tenure the freehold is vested in the lord, Common of and the copyholder is only tenant at will, but secured in his tenancy by the general custom of the manor. Hence a copyholder cannot claim profits in the waste or other manorial land as appurtenant to his tenement by title of prescription, because the lord cannot prescribe to have profits in his own soil. But a special custom of the manor may annex rights to the tenement, and by virtue thereof the copyholder may claim common of pasture, or estovers, or any other profit. Such custom is not open to the general objection to claiming profits by local custom, because it annexes the profit to the tenement, which necessarily has a determinate owner, and not merely to an indeterminate person, as an inhabitant or occupier in a manor or district (q). But the claim of a copyholder to common or other profit in land which is not parcel of the manor cannot be maintained by custom, for custom prevails only within the bounds of the manor; he must prescribe in the name of the lord in right of his tenement in the ordinary manner (r).—Special customs as to commons and profits vary in different manors; and the custom may vary as to different tenements in the same manor, assigning common to some in one part, and to others in other parts of the waste; and there may be a custom applicable to one tenement only, for the other tenements may have become merged or extinguished as copyholds (s). The onus of proving the custom lies upon the tenant who claims the benefit of it (t).

The claim of a copyholder by special custom of a manor Profits of

<sup>(</sup>p) Re Christchurch Inclosure Act. L. R. 38 C. D. 520.

<sup>(</sup>q) Foiston v. Crachroode, 4 Co. 31 b; Gateward's Case, 6 Co. 59 b; Smith v. Gatewood, Cro. Jac. 152.

See post, p. 568.

<sup>(</sup>r) Foiston v. Crachroode, supra. (s) Ibid. (t) Portland v. Hill, L. R. 2 Eq. 765; 35 L. J. C. 439.

copyhold tenement.

to take profits from the soil of his tenement, in excess of the general customary rights of a copyholder, as a customary right to dig and carry away sand, gravel, or other minerals, is not a profit à prendre in the soil of another, but an incident of his own possession. It is therefore not within the Prescription Act, which regulates the prescriptive claims to profits à prendre (u). Such rights may be established by custom, as incidents of the grant of the tenement (v).

Rights of common of lord.

The lord of the soil over which there are rights of common retains all the beneficial uses and profits which are not inconsistent with the rights of the commoners; whatever has not been granted away remains in him without any special reservation. Hence where there are limited rights of common, or more common than is necessary for the commoners, the lord is presumptively entitled to take the rest for his own use (w). Where the owner of a farm claimed the appurtenant right of feeding sheep on a common, the lord of the soil was held entitled to all the pasture which the sheep of the farm did not consume; and therefore the commoner was not entitled to take in other sheep to feed there (x). By custom the copyholders may have the whole pasture of the manorial land, to the exclusion of the lord (y); and by custom the lord may be stinted to a certain number and species of commonable cattle, the tenants taking all the residue of the pasture; in which case a commoner may distrain the lord's cattle put on in excess of his stint, as he might that of a stranger (z). -The right of the lord in such cases is, strictly speaking, a profit to be taken in his own soil, and not a profit to be

(z) Kenrick v. Pargiter, Yelv. 129.

<sup>(</sup>u) Hanner v. Chance, 4 D. J. & S 626; 34 L. J. C. 413.

<sup>(</sup>v) Salisbury v. Gladstone, 9 H. L. C. 692; 34 L. J. C. P. 222. (w) Ellenborough, C. J., Cowlam

<sup>(</sup>w) Ellenborough, C. J., Cowlam v. Slack, 15 East, 112; Bayley, J., Arlett v. Ellis, 7 B. & C. 369.

<sup>(</sup>x) Jones v. Richard, 6 A. & E. 530.

<sup>(</sup>y) Potter v. North, 1 Wms. Saund. 353 (2); Hoskins v. Robins, 2 Wms. Saund. 324; Fisher v. Wren, 3 Mod. 250.

taken in alieno solo; but being a profit to be taken concurrently with the commoners it is often spoken of as a right of common. Thus, "it is not an uncommon thing that the lord has demesne farms that have always been his freehold, and which therefore never could strictly acquire the right of common. Nevertheless the tenants of these demesne lands under the lord did enjoy the same rights of common over the wastes as those persons to whom lands had been conveyed, and they did de facto enjoy and use the rights of common, just as if the freeholder of the demesne lands was not possessed of the freehold of the land over which the right of common was used "(a).

Hence in the General Inclosure Act, 8 & 9 Vict. c. 118, Statutory s. 27, the provision made for compensation for "any right compensation for lord's of pasturage which may have been usually enjoyed by the rights. lord or his tenants," besides the compensation for his right to the soil, is held to include the quasi right of pasturage over the wastes of the manor usually enjoyed by the lord or his tenants in respect of his demesne lands (b). Similarly the Lands Clauses Act, 1845, 8 Vict. c. 18, s. 99, provides for compensation for "any commonable or other rights to which the lord of the manor may be entitled, in lands, other than his right in the soil of such lands."

<sup>(</sup>a) Per cur. Musgrave v. Inclosure Commiss., L. R. 9 Q. B. 175; 43 L. J. Q. B. 87; Arundell v. Fal-mouth, 2 M. & S. 440.

<sup>(</sup>b) Musgrave v. Inclosure Commiss., L. R. 9 Q. B. 162; 43 L. J. Q. B. 80. See Lloyd v. Powis, 4 E. & B.

# Section II. Creation of Profits a Prendre.

Grant of profits à prendre—Statute of Frauds—profits appurtenant. Exceptions and reservations of profits à prendre.

Rights accessory to profits à prendre-rights accessory to mining.

Title by prescription at common law.

The Prescription Act—profits appurtenant—profits of copyhold tenements.

Profits in gross-corporate rights.

Prescriptive usage must be lawful—certain—continuous.

Grant of profit à prendre.

Profits à prendre, being incorporeal hereditaments, are created by grant or by prescription. The grant of a profit à prendre requires a deed, whether it be granted for a freehold interest or for a term of years; and if not made by deed, it operates only as a licence and is revocable (a). "A valid licence for a time certain must be by deed; to give a sole and exclusive right even for an hour a deed is necessary, and that would be a grant; and whether the grantee had it in fee, or for a term of years, or even an hour, he could sue for a disturbance during the time that the interest under his grant continued" (b).-A right to. take profits from land is an interest in or concerning land within the 4th section of the Statute of Frauds, and therefore an agreement respecting it must be in writing signed by the party to be charged with it; as an agreement respecting the right of shooting and taking game (c). A sale of pasture to be taken by the cattle of the buyer is within the statute; but a contract by the owner of pasture for the agistment of cattle or taking in cattle to feed is not a contract within the statute (d).—An agreement for a

Statute of Frauds.

753.

<sup>(</sup>a) Ante, p. 198; Co. Lit. 9 a, b; Duke of Somerset v. Fogwell, 5 B. & C. 875

<sup>(</sup>b) Per cur. Holford v. Bailey, 13 Q. B. 446, citing Hopkins v. Robinson, 2 Lev. 2.

<sup>(</sup>c) Webber v. Lee, L. R. 9 Q. B. D. 315; 51 L. J. Q. B. 485; ante, p. 79.

(d) Jones v. Flint, 10 A. & E.

profit à prendre made in writing and duly signed may be enforced as a contract, although, not being under seal, it is inoperative in law to convey the profits contracted for (e). And if a profit be in fact taken under a parol agreement to pay for it, the payment may be recovered as a debt (f). Also a parol reservation of game upon a parol demise is sufficient to protect a person acting under it from being charged with a trespass in pursuit of game under the statute 1 & 2 Will. IV. c. 32, s. 30 (g).

Profits à prendre which have been made appurtenant to Profits apland by former grant, or by prescription, pass with the purtenant. land by any mode of conveyance that is sufficient to pass the land, and without express mention in the conveyance (h). A demise without deed of a messuage or land, together with incorporeal rights which are not appurtenant to the demised tenement, though it may be effectual as a demise of the tenement, is void as a demise of the incorporeal rights; as in the case of a parol demise of land together with the right of shooting and taking game over other land (i). As to such incorporeal rights, it can operate only as a licence (j).

. Profits à prendre cannot be claimed by way of exception Exceptions or reservation from a grant of land; for an exception, and reservastrictly speaking, applies only to an existing part of the a prendre. thing granted; and the term reservation, strictly speaking, applies only to rents and services to be rendered as the condition of tenure. Whereas profits à prendre are rights newly created by the terms of the deed of grant, and vested in some other person than the owner of the land, either in gross or as appurtenant to other land. Therefore expressions in a deed of grant purporting to except or

<sup>(</sup>e) Smart v. Jones, 15 C. B. N. S. 717; 33 L. J. C. P. 154.

<sup>(</sup>f) Davis v. Morgan, 4 B. & C. 8; Jones v. Reynolds, 4 A. & E. 805. (g) Jones v. Williams, 46 L. J.

M. 272; ante, p. 75.

<sup>(</sup>h) Co. Lit. 121 b; ante, p. 327. (i) Bird v. Higginson, 6 A. & E. 824; The Queen v. Hockworthy, 7 A. & E. 501.

<sup>(</sup>j) Ante, p. 198; Jones v. Williams, 46 L. J. M. 270.

reserve profits to be taken by the grantor can operate only by being construed technically as a re-grant from the grantee, concurrent with the grant by which he is made owner of the land (k).—A grant of land purporting to except and reserve to the grantor the liberty of entering the land to hunt and take game was held to operate effectually as a re-grant to him of the profits to be taken (l). "The privilege of hawking, hunting, fishing, and fouling, is not either a reservation or an exception in point of law; and it is only a privilege or right granted to the lessor, though words of reservation and exception are used "(m). —So, upon a grant of a several fishery or exclusive right of fishing, with reservation to the grantor of catching any kind of fish for his own table, it was held that the "reservation was equal to a grant," being the same as if the grantee, being the general owner, had granted the reserved right to the grantor (n).—Expressions of the above kind, being construed as a re-grant, may operate in favour of other persons than the grantor, and even in favour of strangers to the deed of grant; whereas an exception or reservation in the strict meaning of those terms can operate only in favour of the grantor himself (o).

Accessory rights.

The grant of a profit à prendre imports all rights accessory to the taking of the profit in the usual and proper manner, including such use of the land as may reasonably be required for that purpose. Thus a grant of growing trees impliedly carries with it the right to enter and cut the trees and carry them away in the usual manner, and without liability for unavoidable damage to the ground and herbage in the cutting and carriage of the trees; it also gives the right to enter the land with intending buyers, to view the trees for the purpose of selling

<sup>(</sup>k) Ante, p. 265. (l) Wickham v. Hawker, 7 M. & W. 63. (m) Per cur. Doe v. Lock, 2 A. & E. 743.

<sup>(</sup>n) Seymour v. Courtenay, 5 Burr. 2817. (o) Wickham v. Hawker, supra; Chetham v. Williamson, 4 East,

them (p). A grant of the right to fish in certain water was held to give the right to use the bank for fishing, there being no other means of getting at the fish; but not the right to dig a trench and draw off the water for the purpose of taking the fish, because they might be taken with nets and other means (q). A grant of a fishery in a river may carry with it, according to the usage under it, the right of drawing nets upon the land (r).

incident of the right, the power to enter the land and dig cessory to mining. through the surface to the minerals, and raise and carry away the minerals, doing no more than what is necessary for the purpose (s). A reservation of the coals under land granted was held to include the accessory rights of entering upon the land to dig mines, and of erecting such machinery as was necessary to drain the mines, and to draw up the coals, including a steam engine with a supply of water; also the right of having a convenient and sufficient road for removing the coals profitably, including a properly constructed railway (t). In such cases the implied powers for taking the profits are not restricted by special powers expressly given for the same purpose, unless the restrictive intention is clearly expressed (u).—A power to take gravel from a pit was held to import the right to take it from the sides as well as from the bottom of the pit, and so to cut down the surface and enlarge the pit

laterally (r). But a general power to enter upon land and to search for and take the minerals, was held not to include the right to take a particular mineral by the process of taking off the entire surface of the land, although

it could not be effectually taken otherwise (w).

The right to take minerals carries with it, as an implied Rights ac-

<sup>(</sup>p) Plowden, 16; 11 Co. 52 a, Liford's Case; Stukeley v. Butler, Hob. 168.

<sup>(</sup>q) Plowden, 16.

<sup>(</sup>r) Gray v. Bond, 2 B. & B. 667. (s) Cadogan v. Armitage, 2 B. & C. 197; Rogers v. Taylor, 1 H. & N. 706; 26 L. J. Ex. 203.

<sup>(</sup>t) Dand v. Kingscote, 6 M. & W.

<sup>174.</sup> See post, p. 210. (u) Cadogan v. Armitage, 2 B. & C. 209.

<sup>(</sup>v) Ellis v. Bromley Local Board, 45 L. J. C. 763.

<sup>(</sup>w) Hext v. Gill, L. R. 7 Ch. 699; 41 L. J. C. 293.

Prescription at common law.

The claim to profits à prendre by prescription may be supported at common law, or under the Prescription Act, 2 & 3 Will. IV. c. 71.—The rules and principles of prescription at common law, both of immemorial prescription and of prescriptive evidence of modern grant, have been already treated of in connection with easements. same rules and principles apply with the necessary modifications to profits à prendre. Profits appurtenant to a tenement may be claimed by immemorial prescription at common law; and if the prescription is defeated by proof of commencement of the enjoyment within the time of 'egal memory, the enjoyment in fact may be used as evidence of a modern grant, though such grant be nonexistent. For "as prescription is only evidence of an immemorial grant by which in time beyond memory the right then began to exist, it may equally begin to exist through the same medium, i.e. of grant, now shown or fairly to be presumed from usage, at the present day "(x).

The Prescription Act.

The Prescription Act treats profits à prendre differently from easements in requiring longer periods of enjoyment for proving a title. In other respects the provisions of the Act are the same for both.—Sect. 1 enacts "that no claim which may be lawfully made at the common law, by custom, prescription, or grant to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of any ecclesiastical or lay person or body corporate, except such matters and things as are herein specially provided for, and except tithes, rents and services, shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years; but nevertheless such

<sup>(</sup>x) Cowlam v. Slack, 15 East, 108. See ante, p. 282.

claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."—The operative words of this section are the same as those of the corresponding section relating to easements, except the periods of time. The construction of the words with reference to easements has been already treated, and is here applicable (y).

of common and other profits as are appendant or appurtenant to a dominant tenement, and not to claims of profits in gross. This construction is consequent chiefly upon the fifth section of the Act, which requires the claimant of the right in all pleadings to allege "the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case." No such allegation can be made as to rights in gross; they are therefore constructively excluded from the Act (z). Hence, as with easements, "tenant in fee simple ought to prescribe in his own name; tenant for life, years, and at will, in the name of him who hath the fee; and as he who hath not any interest cannot have any common, so there is none that hath any interest, albeit but at will. and ought to have common, but what, by good pleading,

from or upon land of another; therefore it does not apply to the claim of a copyholder by special custom of a manor

This enactment is construed to apply only to such rights Profits appurement, and other profits as are appendent or appurement.

he may enjoy it" (a).—Also, the enactment applies only to Profits of claims to some profit or benefit to be taken or enjoyed copyhold tenements.

<sup>(</sup>y) Ante, pp. 286—303. (z) Shuttleworth v. Le Fleming, 19 C. B. N. S. 687; 34 L. J. C. P. 309.

<sup>(</sup>a) 6 Co. 60 a, Gateward's Case; see Lord Blackburn, Goodman v. Saltash, L. R. 7 Ap. Ca. 660.

to take profits from the soil of his own tenement, though in excess of the general customary rights of a copyholder; such as a customary right to dig and carry away sand and gravel. Such customs must be proved at common law independently of the statute (b).

Profits in gross.

Corporate rights.

Profits à prendre in gross, not being within the Prescription Act, must be claimed by prescription at common law. The claim may be supported by evidence of immemorial use and enjoyment, either in the claimant himself and the ancestors whose heir he is; or in another person and his ancestors from whom the title is deduced; and the claim must be alleged and proved according to the fact (c). The claimant cannot prescribe in his own person, but must show an immemorial title in those from whom he claims (d). -Profits in gross may also be claimed by prescriptive title in a corporate body, to be enjoyed by individual members of the corporation in right of the body; as an exclusive right of pasturage vested in a borough, to be taken by the burgesses (e); a several fishery in a tidal river vested in a borough for the benefit of the free inhabitants (f); a right of cutting turf and taking gravel and other materials for the benefit of the freemen of the borough (g). Accordingly it is said that "in the common law prescription is made in the name of a certain person and of his ancestors, or those whose estate he hath, or in bodies politic or corporate and their predecessors; for as a natural body is said to have ancestors, so a body corporate is said to have predecessors." An individual member of the corporate body, or the person who in fact takes the profit, prescribes in right of the corporate body (h).

<sup>(</sup>b) Hanmer v. Chance, 4 D. J. & S. 626; 34 L. J. C. 413; Salisbury v. Gladstone, 9 H. L. 692; 34 L. J. C. P. 222; post, p. 568.

<sup>(</sup>c) Welcome v. Upton, 5 M. & W. 398; 6 ib. 536.

<sup>(</sup>d) Cornwell v. Sanders, 3 B. & S. 206; 32 L. J. M. 6.

<sup>(</sup>e) Johnson v. Barnes, L. R. 8 C. P. 527; 41 L. J. C. P. 250. (f) Goodman v. Saltash, L. R. 7

<sup>(</sup>y) The King v. Warkworth, 1 M. & S. 473; The Queen v. Aln-wick, 9 A. & E. 444.

<sup>(</sup>h) Co. Lit. 113 b; Fry, J., Austin

The statute creates no new rights to profits, but only Prescriptive shortens the period of prescription for "claims which may usage must be lawful." be lawfully made." Thus a claim of common over a forest of the Crown which had been actually taken and enjoyed for thirty years was held to be defeated by showing that at the time when the common was first taken the Crown was disabled by statute from granting any such right, so that the claim was legally impossible; and it was said that the statute does not apply to any claim that could not be legally granted, although the commencement of the enjoyment does not appear (i).

A prescriptive claim evidenced by use and enjoyment, Certainty of as well as a claim by grant in express terms, must appear usage. reasonably certain and definite in its nature and extent; for a usage that is vague and uncertain cannot establish a right (j). A prescription to have common of pasture appurtenant for cattle levant and couchant on the tenement, or common appendant for such cattle as are required to cultivate the land, was always held to be sufficiently certain, upon the principle that id certum est quod certum reddi potest (k). So a prescription to cut litter for cattle levant and couchant, or for the use of a farm (1); and a prescription for common of estovers, or the right to take wood and materials for the fuel and repairs of a house, are sufficiently certain (m). A prescription for common of pasture during a time of the year determined as to the opening and close by the commoners themselves was held void; because it was unreasonable that the time of pasture should be determined by the persons who were interested in making it as long as possible. But a prescription for pasture during the season between the

v. Amhurst, L. R. 7 C. D. 692; 47 L. J. C. 469.

<sup>(</sup>i) Mill v. New Forest Commiss., 18 C. B. 60; 25 L. J. C. P. 212. (j) De la Warr v. Miles, L. R. 17 C. D. 535; 50 L. J. C. 754; see Salisbury v. Gladstone, 9 H. L. C.

<sup>692; 34</sup> L. J. C. P. 222.

<sup>(</sup>k) 2 Co. Inst. 86. (i) Bean v. Bloom, 3 Wils. 456; 2 W. Bl. 926; De la Warr v. Miles, L. R. 17 C. D. 535; 50 L. J. C.

<sup>754.</sup> (m) Ante, p. 342.

removal of the crops in each year and the preparing of

the land for sowing is sufficiently certain and precise (n). A claim by the owner of a brick-kiln to dig and take clay from a certain close "as much as was at any time required by him," for making bricks at the kiln, was held to be too vague and uncertain to be made by prescription; there was no measure of the capacity of the kiln, of the quantity of the clay, or of the number of the bricks; it was therefore an indefinite claim to take all the clay, or in other words to take from the owner the whole close (o). And a claim by a copyhold tenant upon an alleged custom of the manor for the tenants to take turf from the waste for the improvement of their gardens "in such quantity as occasion required," was held to be too "indefinite and uncertain" (p).—A prescriptive right may be subject to a condition, according to the usage established; as a right of common, paying for it every year a penny; which was held a condition precedent, so that without payment there was no common, and the cattle trespassing might be distrained (q). A prescriptive right to enter and take minerals, paying a reasonable compensation for the use thereof and for all damage to the land, was held to be an entire prescription, of which the condition, though subsequent to the right, must be alleged and proved (r).

Conditional

prescriptions.

Continuity of enjoyment.

The use and enjoyment required to found a prescriptive title must in general be continuous (s). But in claims of profits by prescription the enjoyment may be such as is not capable of continuity or repetition, as the taking of minerals or parts of the soil, which can be taken only once in the same spot. Such enjoyment, however, may be evidence of a right to take the like profits in other places forming part of one entire waste, manor or district (t).

<sup>(</sup>n) Baylis v. Tyssen-Amhurst, L. R. 6 C. D. 509; 46 L. J. C. 718. (o) Clayton v. Corby, 5 Q. B.

<sup>(</sup>p) Wilson v. Willes, 7 East, 121.

<sup>(</sup>q) Lovelace v. Reynolds, Cro.

Eliz. 546, 563; Gray's Case, 5 Co. 78 b; Cro. Eliz. 405. (r) Paddock v. Forrester, 3 M. &

G. 903.

<sup>(</sup>s) Ante, p. 294.

<sup>(</sup>t) Maxwell v. Martin, 6 Bing.

Thus the usage of cutting turf from a common was held to support the claim of cutting turf from every part of the common where turf could be found; but exclusive of such parts as were incapable of producing turf, which therefore might be inclosed as against the alleged claim (u). The continuity of enjoyment of common of pasture depends upon the seasons, and the kind and quantity of commonable stock kept from time to time, and the extent of the waste or district over which the common ranges (v).

# Section III. Extinction of Profits à Prendre.

Release—release of profits in part of the land—presumption of release from non-user.

Alteration in dominant tenement—severance of dominant tenement exhaustion of servient tenement.

Unity of title of profit and servient land—unity of title in part of the land—common appendant apportionable—unity of title in lord of manor-re-grant of copyhold tenements.

Approvement and inclosure of wastes-Statutes of Merton and of Westminster 2—construction of the statutes—leaving sufficiency of pasture.

Approvement against copyholders—special customs to inclose.

Approvement against turbary and other commons.

Inclosure under Acts of Parliament.

A release of a profit à prendre to the owner of the land Release. in which it is taken operates by way of extinguishment; for "a man cannot have land and a common of pasture issuing out of the same land, et sic de cæteris" (a).—Where Release of there is common appurtenant over land held in several of land. tenements, a release of the common in part of the servient land extinguishes the whole common; otherwise it would throw the whole burden upon the rest of the land, to the

<sup>522;</sup> see Barnes v. Mawson, 1 M. & 123; 20 L. J. Q. B. 133, post, p. S. 77; Tyrwhitt v. Wynne, 2 B. &

<sup>(</sup>v) Carr v. Foster, 3 Q. B. 581. Ald. 554. (u) Peardon v. Underhill, 16 Q. B. (a) Lit. s. 480; Co. Lit. 280 a.

prejudice of the tenants. Accordingly, "a release of common in one acre is an extinguishment of the whole common." But if the whole land in which the common is taken is in one ownership, a release of the common in part will not extinguish the common in the rest, because it is an improvement of part for the benefit of the owner and with his consent (b). An exclusive right of pasture, being a right to take the whole herbage, may be released in part of the land, without extinguishing it in the rest, because it is no increase of the burden on the rest or prejudice to the owners (c).—Where there are several commoners they must all join in a release in order to extinguish the common in part or in all of the land (d).

Presumption of release from non-user.

No presumption of release or abandonment arises from mere non-user of a profit à prendre. Thus where land had been conveyed in fee, with a reservation of a right to take and carry away minerals, and sixty years afterwards, during which there had been no working or claim, the land was conveyed to a purchaser without notice of the reservation, it was held that no presumption arose of a release of the right; the Court said that "the relinquishment of the right cannot be presumed from the nonexercise of it; for that mines are frequently purchased or reserved not only without any view to immediate working, but for the express purpose of keeping them unwrought" (e). Also profits à prendre being incorporeal hereditaments are incapable of adverse possession, and therefore the Statute of Limitations has no application by way of defeating the right (f).

Alteration of dominant tenement.

Profits appurtenant to a dominant tenement are extinguished wholly or in part by such permanent alteration of

<sup>(</sup>b) Rotherham v. Green, Cro. Eliz. 593; per cur. Miles v. Etteridge, 1 Shower, 349; Willes, J., Johnson v. Barnes, L. R. 7 C. P. 600. (c) Johnson v. Barnes, L. R. 8 C. P. 527; 42 L. J. C. P. 259.

<sup>(</sup>d) Kenyon, C. J., Benson v. Chester, 8 T. R. 401.
(e) Seaman v. Vawdrey, 16 Ves.

<sup>(</sup>f) See Smith v. Lloyd, 9 Ex. 562; 23 L. J. Ex. 194.

the tenement as destroys or diminishes the appurtenancy of the profits. "Changes in the mode of managing farms, in the description of cattle kept and the kind of food given, and in the produce raised, the appropriation of the land to other uses, its conversion into nurseries, hop gardens, market gardens, or building ground may permanently diminish the demand of the commoners on the pasture of the common," and may thus work a permanent diminution or extinguishment of the right. Thus, in a case where the question arose whether the lord had left sufficient of the waste to satisfy the rights of the commoners, it was held that the average demand for the last ten years might be taken as a fair measure of the requirements of the commoners for the future (g). Where a tenement, originally of arable land with common appendant for ploughing and manuring the land, is so built over as to be wholly inapplicable for keeping or using cattle, the right of common necessarily ceases and is extinguished. "But if a man has had common for cattle which serve for his plough appendant to his land, and perhaps of late time a house is built upon part, and some part is employed to pasture and some to meadow, in this case the common remains appendant, and it shall be intended, in respect of the continual usage of the common, at the beginning all was arable; but in pleading he ought to prescribe to have it appendant to land that may be ploughed, although it is not now in tillage and ploughed"(h). So also it was held that a right of common appurtenant for cattle levant and couchant was not extinguished or suspended by building upon part of the land and turning the rest into orchard; the capacity for maintaining the cattle remaining, though not in fact exercised (i).—Upon the same principle if a house with the appurtenant profit of taking estovers for fuel and repair be pulled down without intention of re-building, the profit is

<sup>(</sup>g) Lascelles v. Onslow, L. R. 2 ante, p. 334. Q. B. D. 449; 46 L. J. Q. B. 343. (h) 4 Co. 37 a, Tyrringham's Case, (i) Carr v. Lambert, L. R. 1 Ex. 168; 35 L. J. Ex. 121.

thereby extinguished. But if the house is rebuilt substantially as before, the profits are retained; and if the house is altered, in particulars not material to the charge upon the servient tenement, the right to take estovers is not prejudiced, but may be applied to the altered tenement to the same extent as it was enjoyed before (k).

Severance of dominant tenement.

Severance of the tenement to which common is appurtenant does not extinguish the common; but it is apportioned to the several parts of the tenement, each of which carries with it a proportionate share of the common according to the commonable cattle appertaining to that part, so that it can be no more charge to the tenant of the land in which the common is taken after the severance than it was before (1). "So if A. has common appendant to twenty acres of land and enfeoffs B. of part of the said twenty acres to which the common is appendant, this common shall be apportioned, and B. shall have common pro rata" (m). If the commoner leases to a tenant part of the land to which the common is appurtenant "the common during the lease for years is not suspended or discharged, for each of them shall have common rateable and in such manner that the land in which shall not be surcharged; and if so small a parcel be demised which will not keep one ox or a sheep, then the whole common shall remain with the lessor" (n).

Exhaustion of servient tenement.

A profit may be extinguished by exhaustion of the servient tenement. Thus a lease of minerals is practically determined by taking all the minerals before the expiration of the term. For this reason an unexpired term of years in minerals, after exhaustion of the minerals, was held to be no incumbrance upon the title, nor any breach of a covenant for title (o). So after exhaustion of the turf on

<sup>(</sup>k) Luttrell's Case, 4 Co. 86 a; Brown v. Tucker, 4 Leon. 241; Arlett v. Ellis, 9 B. & C. 671. (l) Co. Lit. 122 a; Wild's Case, 8 Co. 78 b.

<sup>(</sup>m) 4 Co. 37 b, Tyrringham's

Case; Bennett v. Reeve, Willes,

<sup>(</sup>n) Morse v. Webb, 13 Co. 66; 8

<sup>(</sup>a) Spoor v. Green, L. R. 9 Ex. 99; 43 L. J. Ex. 57.

a common or on part of a common the lord may inclose against common of turbary or the right of cutting turf (p).

"Unity of possession of the whole land to which a profit Unity of title is appurtenant and of the whole land in which the profit is of profit and servient land. taken is an extinguishment of the right. For when a man has as high and perdurable estate as well in the land as in the common and other profit issuing out of the same land, there the common and profit is extinct." He cannot take common or other profit in his own land as a separate right (q).—Where a person, being owner of part of the Unity of title land in which the common was taken, purchased the land in part of the land. to which it was appurtenant, it was held "that by the said purchase all the common was extinct; for in such case common appurtenant cannot be extinct in part and be in esse for part by the act of the parties" (r). "So if he who has common appurtenant purchase part of the land in which, all the common is extinct; or if he takes a lease of part of the land, all is suspended" (s).—But "common Common appendant may be apportioned because it is of common appendant apportionright, and therefore if the commoner purchases parcel of able. the land in which it is taken, yet the common shall be apportioned. But not so of a common appurtenant, or of any other common of what nature soever "(t).

The lord of a manor cannot have any right of common, Unity of title strictly so called, over the waste of the manor, because he in lord of is the owner of the soil; though pasture of the waste remaining in the lord, subject to the rights of commoners, is frequently so designated (u). Hence, if a tenement of the manor becomes vested in the lord, all appurtenant rights in the wastes of the manor become merged in the ownership and extinguished; and upon a re-grant of the

<sup>(</sup>p) Clarkson v. Woodhouse, 5 T. R.

<sup>412;</sup> see post, p. 365.
(g) 4 Co. 38 a, Tyrringham's Case.
(r) Tyrringham's Case, 4 Co. 38 a;

see ante, p. 356.
(s) 8 Co. 79 a, Wild's Case; Kimp.

ton v. Bellamy, 1 Leon. 43. (t) Co. Litt. 122 a; 4 Co. 37 b,

Tyrringham's Case.

<sup>(</sup>u) Ante, p. 344; Blackburn, J., Musgrave v. Inclos. Comm., L. R. 9 Q. B. 174; 43 L. J. Q. B. 80.

tenement by the lord the rights formerly appurtenant do not pass with it, unless expressly or impliedly regranted (v). If the tenement be re-granted "with all commons and profits used therewith," the former appurtenant rights will pass as being sufficiently described in the grant by reference to the former usage (w). And a re-grant of common rights may also be presumed from a subsequent continued use and enjoyment of them (x).— But by general custom the re-grant of a copyhold tenement carries with it all appurtenant rights of common and other profits without express mention and notwithstanding a preceding surrender; and they presumptively continue appurtenant so long as the tenement remains demisable by copy (y). Enfranchisement of copyhold by conveyance of the fee merges the customary rights of common and other appurtenant rights; and the conveyance of the fee expressly "with the appurtenants" does not preserve them, for they are not appurtenant to the freehold. intended to be preserved they must be expressly regranted, and the Court would compel a re-grant upon evidence of the intention (z).

Copyhold tenements.

Approvement and inclosure of waste.

In early times the lord of a manor exercised freely the right of "approvement," or improvement of the waste land of the manor, by inclosing portions of the waste for the purpose of cultivation, and granting the inclosures to tenants to hold in severalty; who therewith acquired of common right "common appendant" in the residue of the waste. And it is said that "by the common law the lord might improve against any that had common appendant, though not against a commoner by grant"; for in the latter case he could not derogate from the express terms of

<sup>(</sup>v) Hall v. Byron, L. R. 4 C. D. 667; 46 L. J. C. 297.

<sup>(</sup>w) Bradshaw v. Eyre, Cro. Eliz. 570; Worledge v. Kingswell, Cro. Eliz. 794.

<sup>(</sup>x) Cowlam v. Slack, 15 East, 115.

<sup>(</sup>y) Badger v. Ford, 3 B. & Ald. 153.

<sup>(</sup>z) Marsham v. Hunter, Cro. Jac. 253; Styant v. Staker, 2 Vern. 250; Lascelles v. Onslow, L. R. 2 Q. B. D. 433; 46 L. J. Q. B. 333.

his grant (a). This process of inclosure in course of time operated to the prejudice of the commoners by increasing their number and restricting their common; wherefore the right of approvement was declared and regulated in the following statutes.

The Statute of Merton, 20 Hen. III. c. 4, after reciting Statute of that "many great men of England which have infeoffed knights and freeholders of small tenements in their great manors have complained that they cannot make their profit of the residue of their manors, as of wastes, woods and pastures, whereas the same feoffees have sufficient pasture as much as belongeth to their tenements," therefore provided and granted to the effect that they should make their profit of the residue of their wastes, but upon the condition, that their tenants "have as much pasture as sufficeth to their tenements and free egress and regress from their tenements unto the pasture."

The Statute West. 2, 13 Edw. I. st. 1, c. 46, recites that "in Statute a statute made at Merton it was granted that the lords of West. 2. wastes, woods, and pastures might approve notwithstanding the contradiction of their tenants, so that the tenants had sufficient pasture to their tenements with free egress and regress to the same; and forasmuch as no mention was made between neighbours and neighbour, many lords of wastes, woods, and pastures have been hindered heretofore by contradiction of neighbours having sufficient pasture; and because foreign tenants have no more right to common in the wastes, woods, or pastures of any lord than the lord's own tenants"; the statute proceeds to ordain "that the Statute of Merton, provided between the lord and his tenants, from henceforth shall hold place between lords of wastes, woods, and pastures, and their neighbours, saving sufficient pasture to their tenants and neighbours, so that the lords of such wastes, woods, and pastures, may make

<sup>(</sup>a) 2 Inst. 85, 474; see Buller, J., Glover v. Lane, 3 T. R. 448; per cur. Grant v. Gunner, 1 Taunt. 447; ante, p. 336.

approvement of the residue; and this shall be observed for such as claim pasture as appurtenant to their tenements "(b).

Exception of special grant.

Exception is made in the statute, "if any do claim common by special feoffment or grant for a certain number of beasts, or otherwise than he ought to have of common right, whereas covenant barreth the law, he shall have such recovery as he ought to have had by form of the grant made unto him." This exception does not include prescriptive or presumptive grants (c).

Inclosure for buildings.

Exception is also made of inclosures "by occasion of a windmill, sheepcote, cowhouse, inlarging of a court necessary, or courtelage"; "and these five are put but for examples, for the lord may erect a house for the dwelling of a beast-keeper for the safe custody of the beasts, as well of the lords as of the commoners, depasturing there"; also a house for a woodward to take care of the woods of the common (d). The curtilage is allowed only for the manor house or dwelling of the lord of the manor (e).

Construction of statutes.

Inclosure.

Grantee of waste.

These statutes do not apply to a right of common in gross, the words restricting them to commons appendant or appurtenant to tenements; they are also restricted in terms to commons of pasture (f).—"Approvement must be made by some inclosure or defence that it may be made severall; for it is lawful for the tenant to put on his cattle into the residue of the common, and if they stray into that part whereof the approvement is made in default of inclosure he is no trespasser" (g).—The lord of the manor approves in right of owner of the soil and not in exercise of a special manorial right; hence a grantee of the waste or of part thereof may approve, or a lessee for life or

<sup>(</sup>b) 2 Co. Inst. 472. (c) Robinson v. Duleep Singh, L. R. 11 C. D. 798; 48 L. J. C. 758. (d) 2 Co. Inst. 476; Patrick v. Stubbs, 9 M. & W. 830. (e) Nevill v. Hamerton, 1 Lev.

<sup>62;</sup> Sid. 79; Fry, J., Robinson v. Duleep Singh, L. R. 11 C. D. 832. (f) 2 Co. Inst. 86, 475; post, p. 365. (g) 2 Co. Inst. 87; Barber v. Whiteley, 34 L. J. Q. B. 212.

for a term of years; but subject to the conditions imposed upon the lord by the statutes (h).

The onus of proving the sufficiency of pasture left lies Leaving upon the owner of the waste who makes the approve- sufficiency of pasture. ment (i). Sufficiency of pasture, as the condition of inclosing, is to be estimated with regard to the rights and requirements of the commoners at the time of the inclosure, and without regard to former requirements that may have ceased. Changes in the uses and application of the land to which the common is appurtenant may permanently diminish the demands of the commoners and extinguish their rights; or the produce of the common may increase so that a smaller portion of the waste is sufficient (k). Accordingly it has been held, that the average demand for the last ten years might be taken as a measure of the requirements of the commoners for the future, there appearing no expectation of an increase (1). And a subsequent deficiency of common will not invalidate previous approvements (m). Where the waste in question had been part of a royal forest, in which no deer had been seen for twenty years, it was held that the right of the Crown to turn out deer, was not to be taken into consideration in determining the sufficiency of pasture (n).—Where the lord exercises rights of ownership in the soil of the existing waste without inclosure, by taking gravel, clay, turf or other material, the onus of proof is on the tenant and not, as in the case of approvement, upon the lord; and it lies upon the tenant to prove that he is entitled to and deprived of sufficiency of pasture (o). So if the lord plant trees on the waste, which he is presumptively entitled to do, the commoner cannot

<sup>(</sup>h) 2 Co. Inst. 87; Glover v. Lane, 3 T. R. 447; Bayley, J., Arlett v. Ellis, 7 B. & C. 369; Patrick v. Stubbs, 9 M. & W. 830.

<sup>(</sup>i) Betts v. Thompson, L. R. 6

<sup>(</sup>k) Bayley, J., Arlett v. Ellis, 7 B. & C. 369.

<sup>(1)</sup> Lascelles v. Lord Onslow, L.

R. 2 Q. B. D. 449; 46 L. J. Q. B. 333, ante, p. 357. (m) 2 Co. Inst. 87.

<sup>(</sup>n) Lake v. Plaxton, 10 Ex. 196; 24 L. J. Ex. 52; see Boulcott v.

Winnill, 2 Camp. 261. (o) Bateson v. Green, 5 T. R. 411; Hall v. Byron, L. R. 4 C. D. 680; 46 L. J. C. 297.

cut them down as being an obstruction; but he must bring his action and prove that they unduly diminish the pasture (o).

Approvement against copyholders.

At common law the lord approved against copyholders as being tenants at will, not only in law but in fact, until in course of time custom confirmed their tenure, at the same time restricting the lord to approving only so much of the waste as was not required for the customary rights of common. Therefore a custom for the lord to inclose against commoners without limit or restriction cannot be maintained; the lord can inclose only upon the condition of leaving sufficiency of common, according to the principle of the Statute of Merton, which in terms applies only to the freeholders of the manor (p).

Special custom to inclose.

By special custom of a manor the lord may approve with the consent of the homage, being the tenants both freehold and copyhold duly assembled in court; in which case the condition of leaving sufficiency of common is excluded by the consent of the commoners (q). And it seems that a custom may be valid to grant waste with the consent of the homage at courts consisting of copyholders only; who would be equally interested with freeholders in preserving sufficiency of common. It is immaterial that such consent be given by the homage at a court consisting in fact of copyholders only, if the freeholders were duly summoned to attend (r). There may be a custom for a tenant to approve with the consent of the homage: but such custom was held not to supersede or abridge the lord's right of approvement (s). A custom for the lord to

<sup>(</sup>o) Sadgrove v. Kirby, 6 T. R. 483; Bayley, J., Arlett v. Ellis, 7 B. & C. 362; post, p. 370.
(p) Badger v. Ford, 3 B. & Ald. 153; Arlett v. Ellis, 7 B. & C. 346.
(q) Bayley, J., Arlett v. Ellis, 7 B. & C. 368; Wentworth v. Clay, Ca. t. Finch, 263; Folkard v. Hemmett, 5 T. R. 417 (a); Boulcott v.

Winmill, 2 Camp. 261.

<sup>(</sup>r) Lascelles v. Onslow, L. R. 2 Q. B. D. 454; 46 L. J. Q. B. 333. See the custom stated in Phillips v. Salmon, L. R. 3 C. P. D. 97; 47 L. J. C. P. 53.

(s) Duberley v. Page, 2 T. R.

<sup>392</sup> a.

approve prevails only within the manor and against the tenants of the manor, and therefore cannot exclude commoners who are not tenants (t).—If the custom be to grant inclosures of the waste as copyhold, it seems they are to be considered as much copyhold tenements as if immemorially held by copy, and therefore entitled to all customary rights of common over the residue of the waste (u). Where the lord enfranchised copyhold land and granted it as freehold, with all such rights of common "as the freeholders and tenants of the manor have used and enjoyed," it was held that the commons granted were subject to the customs of the manor, and that a custom of inclosure might be exercised against them, though the land after enfranchisement ceased to be held of the manor (v).

"Throughout all the Statute of Merton pastura et com- Common of munia pasturæ is named, so as this statute of approvements other comdoth not extend to common of pischary, of turbary, of mons. estovers, or the like"; and the lord cannot in general approve against such rights (w). The lord cannot inclose against common of turbary, because the turf is not renewable like pasture, and therefore the commoners in course of time must require it all (x). But the lord may inclose such parts of the waste as are not capable of turbary, or have been exhausted of turbary (y). And by special custom of a manor the lord may approve the waste against common of turbary and other commons, leaving sufficient for the commoners (z). A custom of a manor for the owner of the waste to assign from time to time parts of it

<sup>(</sup>t) Sewers' Commiss. v. Glasse, L. R. 19 Eq. 134; 44 L. J. C.

<sup>(</sup>u) Northwick v. Stanway, 3 B. & P. 346.

<sup>(</sup>v) Lascelles v. Onslow, L. R. 2 Q. B. D. 433; 46 L. J. Q. B. 333. (w) 2 Co. Inst. 87; Duberly v. Page, 2 T. R. 391.

<sup>(</sup>x) Grant v. Gunner, 1 Taunt.

<sup>(</sup>y) Clarkson v. Woodhouse, 5 T. R. 412, n. (a); Peardon v. Under-hill, 16 Q. B. 120; 20 L. J. Q. B.

<sup>(</sup>z) Arlett v. Ellis, 7 B. & C. 371; Lascelles v. Onslow, L. R. 2 Q. B. D. 433; 46 L. J. Q. B. 333.

called moss dales to the commoners, in which to take their turbary exclusively of the rest of the waste, and for the owner to inclose those parts after the turbary is exhausted, was held to be a reasonable and valid custom (a). The lord may approve against common of pasture, notwithstanding that there may be common of turbary or other commons over the same waste against which he could not inclose; because they are distinct rights, and the inclosure against pasture is not necessarily a disturbance of the other commons (b).—Common of vicinage, being merely an excuse of trespass, may be extinguished at any time by inclosing and fencing the common (c).—Common fields may be inclosed by any of the freeholders against the others, to the exclusion of the common right, at the same time extinguishing their own (d).

Inclosure under Acts of Parliament.

In modern times the inclosure of common lands and the absolute extinguishment of common rights are generally effected by local Acts of Parliament, subject to the provisions of the General Inclosure Acts (e). Under this process common appendant and the customary manorial rights of common, common fields and lammas lands, commons of turbary and of estovers, have greatly diminished and are rapidly disappearing; a separate and exclusive tenure being found to be more suitable to modern cultivation and requirements. An allotment made under an Inclosure Act in exchange for common rights extinguished by the Act creates a separate property with a distinct title, and is not an appurtenance of the tenement to which the common rights were before appurtenant; so that a grant of the latter, whether with

<sup>(</sup>a) Clarkson v. Woodhouse, supra.
(b) Fawcett v. Strickland, Willes,
57; 6 T. R. 747 n; Shakespear v.
Peppin, 6 T. R. 741.
(c) Ante, p. 338; Wells v. Pearcy,
1 Bing. N. C. 566.

<sup>(</sup>d) Ante, p. 340; Corbet's Case,

<sup>7</sup> Co. 5; Hickman v. Thorn, 2 Mod. 104.

<sup>(</sup>e) See the Inclosure Clauses Consolidation Act, 41 Geo. 3, c. 109; the General Inclosure Act, 8 & 9 Vict. c. 118, 's. 11; the Commons Act, 1876, 39 & 40 Vict. c. 56.

or without general words including appurtenant rights, will not carry with it the new allotment, as it formerly did the appurtenant rights of common (f).

# SECTION IV. REMEDIES FOR PROFITS A PRENDRE.

Remedies for exclusive profits—minerals—pasture. Remedies of commoner-action for surcharging common-distress of cattle damage feasant—remedies against lord. Abatement of nuisance to common—nuisance created by lord. Bill of peace concerning common rights.

The grantee of an exclusive right to take minerals, Remedy for being in possession by exercise of his right, may maintain exclusive profits, an action of trespass or of ejectment against anyone who minerals. disturbs his possession by wrongfully entering and taking the minerals; possession alone being sufficient to maintain an action against a wrongdoer (a).

Upon the same principle a person in exclusive posses- Pasture. sion of the pasture or herbage of land may maintain an action of trespass against any person who wrongfully disturbs his possession by putting on cattle to feed, or by otherwise taking the pasture or herbage (b). And he has all other remedies appropriate to the possession of land, as the remedy by distraining cattle damage feasant (c). The mere pasturing of cattle without any title is not such a possession as will support an action of trespass against another person who does the same, because it is not in fact an exclusive possession (d).—At the same time the possessor of the land subject to such exclusive rights to the surface profits may maintain an action for trespass to

<sup>(</sup>f) Williams v. Phillips, 51 L. J. Q. B. 102; L. R. 8 Q. B. D. 437. (a) Harker v. Birkbeck, 3 Burr. 1556; 1 W. Bl. 482; per cur. Rogers v. Brenton, 10 Q. B. 52; ante, p. 54.
(b) Crosby v. Wadsworth, 6 East,

<sup>601;</sup> Coverdale v. Charlton, L. R. 4 Q. B. D. 104; 47 L. J. Q. B. 446. (c) Burt v. Moore, 5 T. R. 329; see Jones v. Richards, 5 A. & E. 413. (d) Coverdale v. Charlton, L. R. 4 Q. B. D. 104; 47 L. J. Q. B.

the land in any other respect, as for digging holes into the sub-soil; though he cannot maintain an action for a trespass to the surface of which he has not the possession (e).

Remedy of commoner. Action for surcharging common. The remedy of a commoner against another commoner for surcharging the common, that is, turning out cattle in excess of his right, is an action upon the case for damages; in which action a commoner is entitled to recover nominal damages upon proof of the wrong, without showing any specific or substantial damage, for otherwise the wrong-doer might gain a prescriptive title by continued enjoyment (f). He may maintain an action for surcharging, although he have not any cattle of his own on the common at the time of the surcharge (g). And he may maintain the action, although he is himself surcharging, and consequently taking more profit than he is entitled to (h).—So, a commoner may maintain an action for injury to the common by removing the manure of the cattle, though his proportion of the damage be inappreciable (i).

Distress of cattle damage feasant.

A commoner may distrain the cattle of a stranger damage feasant upon the common or may drive them out; but he cannot in general distrain the cattle of a commoner claiming under a colour of right, because he cannot make himself judge in his own cause. This rule applies where the claim is for cattle levant and couchant, or for cattle proportionate to a tenement, or for cattle limited by any other measure that is a matter of judgment. But if the claim is for a number absolutely certain without reference to any other measure, cattle commoned in excess of the number may be distrained, because it requires no judgment to determine the number, and there can be no colour and right for such excess. So, if there be a close season during which all

<sup>(</sup>e) Cox v. Glue, 5 C. B. 533. (f) Atkinson v. Teasdale, 2 W. Bl. 816; 3 Wils. 278; Hobson v. Todd, 4 T. R. 71; Bowen v. Jenkin, 6 A. & E. 911.

<sup>(</sup>g) Wells v. Watling, 2 W. Bl. 1233.

<sup>(</sup>h) Hobson v. Todd, 4 T. R. 71. (i) Pindar v. Wadsworth, 2 East,

cattle are excluded, cattle commoned during that season may be distrained (j). In distraining cattle put on a common in excess of a stinted number, the last put on must be taken as being those wrongfully upon the common; unless they were all put on together, in which case so many may be taken as are in excess of the number (k). These rules apply to common pur cause de ricinage as well as to common appurtenant (l).

Similar remedies apply by a commoner in the waste of a Remedies manor against the lord. Where the lord surcharges or against lord. otherwise uses the waste without leaving sufficient pasture for the commoners, the latter may proceed against the lord by action. Where by custom the lord is excluded from the waste, or is stinted to a certain number and kind and puts on cattle beyond his stint, the commoner may distrain his cattle damage feasant (m).

A commoner is entitled to remove any obstructions, such Abatement of as hedges or fences of unlawful inclosures, whether erected nuisance to common. by a stranger or by the lord of the soil; as being nuisances which a private person may himself abate. "If the lord of a manor approve part of the waste and leave not sufficient common in the residue, the commoner may break down the whole inclosure, because it standeth upon the ground which is his common" (n). "Where a fence has been erected upon a common, inclosing and separating parts of that common from the residue, and thereby interfering with the rights of the commoners, the latter are not by law restrained, in the exercise of those rights, to pulling down so much of that fence as it may be necessary for them to remove for the purpose of enabling their cattle

<sup>(</sup>j) Mary's Case, 9 Co. 112; Hall v. Harding, 4 Burr. 2426. (k) Ellis v. Rowles, Willes, 638. (l) Cape v. Scott, L. R. 9 Q. B. 269; 43 L. J. Q. B. 65.

<sup>(</sup>m) Hoddesdon v. Gresil, Yelv. 104; Cro. Jac. 195; Kenrick v.

Pargiter, Yelv. 129; Cro. Jac. 208; per cur. Hall v. Harding, 4 Burr. 2430; Atkinson v. Teasdale, 2 W.

Bl. 817; 3 Wils. 278.
(n) 2 Co. Inst. 88; Mason v. Cæsar, 2 Mod. 65.

to enter and feed upon the residue of the common, but they are entitled to consider the whole of that fence so erected upon the common as a nuisance and to remove it accordingly "(o). A commoner may pull down a dwelling-house that is wrongfully built upon the common; but not while persons are dwelling in it, on account of the risk of causing a breach of the peace (p); at least, not without first giving them notice of his intention and requesting them to leave (q).

Nuisance created by lord.

If the lord of a manor plants trees upon a common, he is presumptively acting within his right as owner of the soil, and the trees are regarded as part of the soil; consequently it is held that the commoners have no right to cut them down as a nuisance, but they must proceed by action to prove that the trees are in excess and injurious to their common rights (r). So, where the lord turned out rabbits on the common it was held that they were not injurious, unless in excess; and that a commoner was not justified in killing the rabbits, but must proceed by action to prove that they had become a nuisance to the common(s).

Bill of peace.

At common law where title to common was in question involving the rights of numerous commoners, an action decided the question only between the plaintiff and defendant, without binding any other persons interested, each of whom might litigate it separately. Therefore to avoid multiplicity of actions the Court of Chancery admitted a bill, commonly called a "bill of peace," to be brought by a lord against his tenants, or by tenants against the lord, or by tenants between themselves, concerning rights of

<sup>(</sup>o) Bayley, J., Arlett v. Ellis, 7 B. & C. 362.

<sup>(</sup>p) Perry v. Fitzhowe, 8 Q. B.

<sup>(</sup>q) Davies v. Williams, 16 Q. B. 546; 20 L. J. Q. B. 330.

<sup>(</sup>r) Sadgrove v. Kirby, 6 T. R.

<sup>483; 1</sup> B. & P. 13; Bayley, J., Arlett v. Ellis, 7 B. & C. 362. (s) Anon., 2 Leon. 201; Bellew v. Langdon, Cro. Eliz. 876; Hadesdon v. Grissell, Cro. Jac. 195; Yelv. 104; Cooper v. Marshall, 1 Burr. 259; Cope v. Marshall, 2 Wils. 51.

common; and it is no objection to such bill that the defendants may each be entitled to make a separate defence, provided there be one general question to be settled which pervades the whole (t). The lord may bring a suit against one or more of the tenants on behalf of all, to be quieted in the possession of an approvement or inclosure against the rights of common of all (u). And a tenant on behalf of himself and all other tenants, whether freeholders or copyholders or both, may sue the lord for the establishment of the rights of common over waste inclosed by the lord (v).—The practice is now sanctioned generally in all Divisions of the High Court by Order XVI. r. 9: "Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such action, on behalf or for the benefit of all parties so interested."

<sup>(</sup>t) Per cur. Powell v. Powis, 1 Y. & J. 165; Hardwicke, L. C., York

v. Pilkington, 1 Atk. 282; Tenham v. Herbert, 2 Atk. 483. (u) Eldon, L. C., Hanson v. Gar-diner, 7 Ves. 309; Sewers Commiss. v. Glasse, L. R. 7 Ch. 456; 41 L. J.

<sup>(</sup>v) Powell v. Powis, supra; Smith v. Brownlow, L. R. 9 Eq. 241; 39 L. J. C. 636 (1); Warrick v. Queen's Coll., L. R. 6 Ch. 716; 40 L. J. C. 780; Betts v. Thompson, L. R. 6 Ch. 732. See post, p. 570.

## CHAPTER III.

#### RENTS.

Section I. Creation of rents.

II. Extinction and apportionment of rents.

III. Remedies for rent.

### SECTION I. CREATION OF RENTS.

§ 1. Rent service.—§ 2. Rent charge and annuity.—§ 3. Tithe rent charge.

### § 1.—Rent Service.

Rent—rent service—distress—rent charge—rent seck—distress by statute.

Reservation of rent service—by deed or will—reservation to stranger.

Reservation of rent upon grant in fee simple—upon grant of particular estate—upon lease for years—tenancy at will—tenancy under agreement for lease.

Attornment of mortgagor as tenant to mortgagee—lease by mortgagor in possession.

Limitations of rent service—construction of limitations.

Rent of incorporeal hereditaments—rent of personal chattels.

Fee farm rents—rents of assize—quit rents—apportionment—redemption.

Rent is a profit issuing out of land, which is rendered or paid periodically by the tenant. It is said therefore to lie in *render*, in distinction to a profit à prendre which is taken from the land without the intervention of the tenant (a). The term "render" seems appropriate to profits rendered in kind, and "payment" to rent in money; thus the rendering of a peppercorn rent was held not to be a "pay-

<sup>(</sup>a) Ante, p. 186; Co. Lit. 142 a; 10 Co. 128 a, Clun's case.

ment of rent" within the Conveyancing Act, 1881, s. 3, (4) (b). A rent of a silver penny was held to be a rent "having no money value" in the meaning of the same Act, s. 65(c).

At common law rents are distinguished as of three kinds: Rent service. rent service; rent charge; and rent seck (d).—Rent service is the rent rendered for the tenure of land. The services of tenure consisted at common law in rendering to the lord profits of the land in money or in kind, or in performing for him work and labour or other duties which were equivalent to profits; but in process of time nearly all services became commuted, by agreement or usage, into fixed money payments, or rents in the ordinary meaning of the term (e).—Rent service was attended at common law with Distress. the remedy of distress; by which if the rent were in arrear and unpaid, or the services unperformed, the lord might enter upon the land during the tenancy, and seize any personal chattels there found, and detain them as a pledge for the payment of the arrears of rent or for the performance of the services (f).

Rent may be payable out of land independently of Rent charge. tenure. The owner of land, whether in fee or for life or for a term of years, may grant or assign the whole of his estate and interest in the land, leaving in himself no reversion, but reserving a rent; or he may grant to another a rent out of the land, reserving to himself the estate and possession. In such cases the rent has no connection with tenure and is not rent service, nor has it at common law the incidental remedy of distress. But a power of distress may be given or reserved by an express clause in the deed of grant or conveyance, with the effect of charging the land with the rent, which is then called a rent-charge (g).

A rent service may become disconnected with tenure by Rent seck.

<sup>(</sup>b) Re Moody and Yates, L. R. 30 C. D. 346; 54 L. J. C. 887. (c) Re Chapman and Hobbs, L. R. 29 C. D. 1007; 54 L. J. C. 810.

<sup>(</sup>d) Lit. s. 213.

<sup>(</sup>e) See ante, Vol. I. Chap. I. "Tenure."

<sup>(</sup>f) Lit. s. 213; Co. Lit. 142 a; Bullen on Distress, 21; post, p. 422. (g) See post, p. 385.

act of the reversioner, as if he conveys away the reversion to which the tenure is incident, but expressly reserves to himself the rent; or if he conveys away the rent separately, reserving the reversion and tenure. The rent is prima facie an incident of the reversion, and passes to a grantee of the reversion unless expressly reserved; but not the reversion with the rent. By severing the rent from the tenure, the remedy of distress, which was an incident of the tenure, is no longer available at common law (g). Rents deprived of the remedy of distress, whether originally so created, or becoming so by a subsequent act, were called rents seck (h).

Distress by statute.

But by the Statute 4 Geo. II. c. 28, s. 5, it was enacted that "all and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same in cases of rents seck, rents of assize and chief rents, which have been duly answered or paid for the space of three years, within the space of twenty years before the first day of this present session of Parliament, or shall be hereafter created, as in case of rent reserved upon lease" (i). Rents seek issuing out of or charged upon freehold interests in land without express power of distress are distrainable under this statute (j); but rent seck issuing out of a term of years or chattel interest seems to have been considered not to be within the statute (k).—Now by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 44, the remedy of distress is given, subject to the conditions of the Act, "where a person is entitled to receive out of any land, or out of the income of any land, any annual sum payable half yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or other-

<sup>(</sup>g) Lit. ss. 225, 229; Sheppard's Touchst. 89, 114.

<sup>(</sup>h) Lit. ss. 218, 226; Co. Lit. 150 b.

<sup>(</sup>i) See Musgrave v. Emmerson, 10 Q. B. 326. As to rents of assize and other kinds of rent, see post,

p. 383.
(j) Dodds v. Thompson, L. R. 1
C. P. 133; 35 L. J. C. P. 97.

<sup>(</sup>k) Per cur. v. Cooper, 2 Wils. 375; see Bullen on Distress, p. 54, App. (A).

wise, not being rent incident to a reversion." The remedy of distress, therefore, is now attendant upon every species of rent, either by common law, or under an express clause of distress, or by statute.

Rent service is said to be reserved, as distinguished from Reservation a specific part of the land which may be excepted. technical language an exception refers to a part of the tenement granted and of a thing in esse, and it leaves the part excepted in the grantor as before; a reservation of rent creates a new right which did not exist before, issuing out of the tenement to the use of the grantor (1).—Rent By deed. service may be reserved by any conveyance that is effective to pass an estate, leaving a reversion in the grantor to which tenure may be incident. It may be reserved upon a deed of grant operating at common law, or under the Statute of Uses, or by way of appointment under a power, or upon a grant of a reversion or remainder, or upon a lease for life or for years, or upon a parol lease where such a lease is effective (m). It may be reserved by deed poll. for when the grantee accepts the deed, he agrees to the rent, and the rent is reserved by the words of the grantor and not by the grantee (n).—It may be reserved upon a By will. devise by will of a particular estate; a rent service is thereby created which is incident to the reversion, and passes with it to the heir or devisee of the testator (o). But in the case of two independent devises of the land and of the rent, it is not rent service but a rent seck; unless charged upon the land by a special clause of distress, which would make it a rent charge (p).

Rent service, properly so called, can be reserved only Reservation to the grantor or lessor of the particular estate out of to stranger.

which it issues, who retains the reversion to which the

<sup>(</sup>l) Co. Lit. 47 a; Perkins, ss. 625, 626; Doe v. Lock, 2 A. & E. 743. (m) Co. Lit. 144 a; post, p. 376.

<sup>(</sup>n) Co. Lit. 143 b. (o) Machel v. Danton, 2 Leon. 33. (p) Webb v. Jiggs, 4 M. & S. 120.

rent is incident; it cannot be reserved to a stranger to the estate (q). Payment of rent to a stranger may be imposed as the condition of an estate, with a right of re-entry for breach of the condition; but it is not properly a rent, nor can the stranger take advantage of the condition by entry (r).

Reservation upon grant in fee simple.

At common law, before the Statute of Quia Emptores, 18 Edw. I. c. 1, "if a man had made a feoffment in fee simple, by deed or without deed, yielding to him and to his heirs a certain rent, this was a rent service, and for this he might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service as the feoffor held of his lord next paramount" (8). statute, a feoffment in fee created no new tenure to the feoffor, but the feoffee held the land immediately of the lord next paramount by force of the statute; and if a new rent was expressed to be reserved, it was not rent service, nor was there any right of distress without an express clause to that effect, making it a rent charge (t).—The statute applied only to the alienation of the whole fee; and if a grant was made for a particular estate, in tail or for life, rendering a certain rent, the reversion remaining in the grantor; or if several particular estates were granted in succession, leaving a reversion in the grantor, the rent was rent service and attended with the right of distress (u). If the grant was made for a particular estate with remainder over in fee, leaving no reversion in the grantor, the grantees held of the superior lord by force of the statute; the rent reserved was not rent service and there was no right of distress, without an express clause (v).

Grant of particular estate.

Reservation of rent upon

If a lease be made for a term of years, reserving rent,

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(q) Lit. s. 346; Co. Lit. 47 a, (t. 143 b. s. 2)
(r) Lit. s. 345; Jenison V. Lev. 627
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<sup>(</sup>r) Lit. s. 345; Jenison v. Lexington, 1 P. Wms. 557.
(s) Lit. s. 216. See post, p. 383.

<sup>(</sup>t) Ante, Vol. I. p. 18; Lit. s. 215; Bradbury v. Wright, Dougl. 627.

<sup>(</sup>*n*) Lit. s. 214; Co. Lit. 142 *b*. (*v*) Lit. s. 215.

it is a rent service, and the lessor may distrain at common lease for law (u). By the Statute of Frauds, 29 Car. II. c. 3, s. 1, years. it is required that all leases should be made in writing and signed; and by 8 & 9 Viet. c. 106, s. 3, it is required that leases required to be in writing shall be made by deed. But the Statute of Frauds, s. 2, excepts "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised." Therefore in leases by parol within the exception rent service may be reserved, as in a lease at common law.— If a lessee for a term of years makes an underlease for a Underlease. less term leaving a reversion, however small, and reserving a rent, it is a rent service at common law with a right of distress (x). And a tenant from year to year, underletting for a term of years, has a reversion with right of distress (y). But upon an assignment of a term of years, leaving no reversion in the assignor, but reserving a rent, there is no tenure and consequently no rent service strictly so called, nor any right of distress at common law; and an underlease for the whole term is equivalent to an assignment in this respect (z).

Rent may be reserved on a tenancy at will and the Tenancy at lessor may distrain for arrears; but it is not rent service will. strictly so called, because there is no tenure (a). - Where, Tenancy as frequently happens, a tenant enters and takes possession under agreement for under a mere agreement for a lease, not operating as a lease. legal demise, he was considered at common law to be in the position of a tenant at will until a lease was executed, and if there was a fixed rent reserved it was recoverable by

<sup>(</sup>w) Lit. s. 214.

<sup>(</sup>x) Wade v. Marsh, Latch, 211. (y) Tenterden, C. J., Curtis v. Wheeler, Mood. & M. 493. Per cur.

Oxley v. James, 13 M. & W. 214. (z) Parmenter v. Webber, 8 Taunt. 593; Thorn v. Woolcombe, 3 B. & Ad. 586; Preece v. Corrie, 5 Bing.

<sup>24;</sup> Pollock v. Stacy, 9 Q. B. 1033; see Wollaston v. Hakewill, 3 M. & G. 297; Beardman v. Wilson, L. R. 4 C. P. 57; 38 L. J. C. P.

<sup>(</sup>a) Lit. s. 72; Co. Lit. 57 b; 142 b; Anderson v. Midland Ry. Co., 3 E. & E. 614; 30 L. J. Q. B. 94.

But upon payment of rent a tenancy from year to year was implied in law(b). The Court of Chancery would decree specific performance of the agreement by the execution of a lease according to its terms; and the rent and remedies would then be regulated by the terms of the lease. Under the Judicature Acts, the same remedies are given in all Divisions of the Court; therefore "a tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. He is not since the Judicature Act a tenant from year to year, he holds under the agreement, and every branch of the Court must give him the same rights. There are not two estates as there were formerly, one estate at common law, by reason of the payment of the rent, from year to year, and an estate in equity under the agreement. There is only one Court and the equity rules prevail in it. The tenant holds under an agreement for a lease; he holds, therefore, under the same terms in equity as if a lease had been granted "(c).

Attornment of mortgagor as tenant to mortgagee.

It is usual in mortgages, for securing punctual payment of the interest upon the mortgage debt, to insert an attornment clause, by which the mortgagor attorns or acknowledges himself to be tenant to the mortgagee at a certain rent, equal to or greater than the amount of the interest. The tenancy thus created carries with it the power of distress, with all the usual rights and incidents, whether of the common law or statutes, of a distress for rent service (d). Where the attornment was made to a receiver of the mortgaged estate, it was held effectual to entitle him to distrain under it (e). In the case of a second mortgage, operating only upon the equity of redemption,

Q. B. 220.

See Coatsworth v. Johnson, 55 L. J.

<sup>(</sup>b) Ante, Vol. I. pp. 201, 206; Anderson v. Midland Ry Co., 3. E. & E. 614; 30 L. J. Q. B. 94; see Vincent v. Godson, 4 D. M. & G. 546. (c) Jessel, M. R., Halsh v. Lonsdale, L. R. 21 C. D. 14; 52 L. J. C. 2.

<sup>(</sup>d) Kearsley v. Philips, L. R. 11 Q. B. D. 621; 52 L. J. Q. B. 581. (e) Jolly v. Arbuthnot, 4 D. & J. 224; 28 L. J. C. 547.

though there can be no legal tenancy, the attornment clause is effectual by way of contract or estoppel, and enables the mortgagee to distrain (f), and a similar attornment clause may be inserted in successive mortgages (g). But such attornment is within the Bills of Sales Act, 1878, s. 6, which enacts that it "shall be deemed to be a bill of sale of any personal chattels which may be seized or taken under such power of distress" (h). The rent reserved between mortgagor and mortgagee in an attornment clause, if greater than necessary to secure the mortgage debt and interest, may operate in fraud of the bankruptcy law, and therefore be void against other creditors (i).

If a mortgagor, remaining in possession after conveying Lease by his title to the mortgagee, make a lease reserving a rent, the lessee entering under it cannot dispute his title, and the mortgagor has a reversion by estoppel to which the rent is incident with the right of distress, so long as the possession of the lessee continues. The lease is, in general, wholly void as against the mortgagee, who may enter at any time and evict the lessee; or he may give notice to the tenant to pay the rent to him, which the tenant may accept (j). But the mortgagee has no claim against the mortgagor for rents or profits received whilst he remains in possession (k).—By the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, s. 18, a mortgagor in possession has now a limited statutory power of making leases valid against the mortgagee and all other incum-

<sup>(</sup>f) Morton v. Woods, L. R. 4 Q. B. 293; 38 L. J. Q. B. 81. (g) Ex parte Punnett, Re Kitchin, L. R. 16 C. D. 226; 50 L. J. C.

<sup>212.
(</sup>h) Re Willis, Ex parte Kennedy,
L. R. 21 Q. B. D. 384; see Hall
v. Comfort, L. R. 18 Q. B. D. 11;
56 L. J. Q. B. 185.
(i) Ex parte Williams, L. R. 7 C.
D. 138; 47 L. J. B. 26; Re Stockton
Iron Co., L. R. 10 C. D. 335; 48
L. J. C. 417; Ex parte Jackson, L.

R. 14 C. D. 725; Ex parte Voisey, Re Knight, L. R. 21 C. D. 442; 52 L. J. C. 121.

L. J. C. 121.

(j) Ante, Vol. I. p. 290; Alchorne v. Gomme, 2 Bing. 54; Johnson v. Jones, 9 A. & E. 809; Underhay v. Read, L. R. 20 Q. B. D. 209; 57 L. J. Q. B. 129.

(k) Yorkshire Building Co. v. Mullan, L. R. 35 C. D. 125; 56 L. J. C. 562; Garfit v. Allen, 57 L. J. C. 420.

brancers. The leases authorised are: (1) an agricultural or occupation lease for any term not exceeding twenty-one years; and (2) a building lease for any term not exceeding ninety-nine years. The section further provides numerous requirements for such leases, as to possession, rent, and other matters for the security of the mortgagee.

Limitations of rentservice.

The reservation of rent service must be made with proper words of limitation to define the estate in the rent. If the reservation is to the lessor and his heirs, the rent is made incident to the reversion in fee and passes with it, whether to assigns in law or assigns in deed. But if the reservation is to the lessor only, without any words of limitation or construction to extend it to his heirs, it is a reservation to him for life only; and the rent determines by his death, if he die within the term. So it is, if the reservation is to him and his assigns, or to him and his executors; unless it be reserved upon an underlease of a term of years, the reversion of which will pass to the executors (1). A reservation "to the heirs" of the lessor, omitting the lessor himself, would be a bad reservation of rent service, because the heir would take by purchase and would be in the position of a stranger (m). A reservation of rent "to him or his heirs, is good to the lessor for the term of his life, and void as to his heir"; unless the word "or" may be construed "and" (n). If tenant in tail make a lease for years, reserving rent to him and his heirs, the rent will go with the reversion to the heir-intail (o).—By the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 51 (1), "In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body. (2) This section applies

<sup>(</sup>l) Co. Lit. 47 a, 215 b. (m) Co. Lit. 213 b; Oats v. Frith, pp. Hob. 130.

<sup>(</sup>n) Co. Lit. 214 a; ante, Vol. I. pp. 156, 160.
(o) 2 Wms. Saund. 371 (7).

only to deeds executed after the commencement of this

Reservations of rent service are construed, if possible, so Construction as to support the reservation and attach the rent to the tions. reversion. Accordingly, if the rent be reserved generally "during the term" without showing to whom it is intended to go, it will go with the reversion to the lessor and his heirs, or to whomsoever may be entitled to the reversion (p). In the case of a joint lease by tenants in common, reserving rent without saying to whom payable, it was held that upon the death of one of the lessors, the reversion being severed, the rent followed the reversion (q). —Where land is settled for estates for life with remainders over, and a power of leasing is given, the leases executed under the power take effect as if inserted in the deed of settlement, which also limits the reversion; the law will then appropriate the rent to the successive estates in the reversion. In such cases the approved way of reserving the rent is "to reserve the rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person "(r).

"A rent must be reserved out of the lands or tenements Rent of whereunto the lessor may have resort or recourse to incorporeal hereditadistrain, and therefore a rent cannot be reserved out of ments. any incorporeal inheritance. But if the lease be made of them by deed for years, it may be good by way of contract to have an action of debt; but distrain the lessor cannot. Neither shall it pass with the grant of the reversion, for that it is no rent incident to the reversion" (s). If land be leased together with incorporeal hereditaments, with a reservation of rent, there is a

<sup>(</sup>p) Co. Lit. 47 a; Sacheverell v. Froggatt, 2 Wms. Saund. 367.
(q) Beer v. Beer, 12 C. B. 60; 21 L. J. C. P. 124.
(r) Whitlock's Case, 8 Co. 71 a; Combe's Case, 9 Co. 75; Isherwood v. Oldknow, 3 M. & S. 382; Greena-

vay v. Hart, 14 C. B. 340; 23 L. J. C. P. 115; Yellowly v. Gower, 11 Ex. 274; 24 L. J. Ex. 289.
(s) Co. Lit. 47a, 142a. Jewel's Case, 5 Co. 3a; Butt's Case, 7 Co. 23b; Dean of Windsor v. Gover, 2 Wms. Saund. 301.

remedy by distress against the land though not against the incorporeal property; the rent issues wholly out of the land in point of remedy, but in point of render out of both together (t). Where a wharf was let together with the easement of mooring barges in the adjacent river between high and low water mark, it was held that the lessor could not distrain barges in the river where there was a mere easement (u).—So "a rent cannot be reserved or granted out of a rent. Part of a rent may be granted, but a new rent cannot be reserved or granted thereout, because no distress can be taken of it" (v). "But if a man demiseth the vesture or herbage of his land, he may reserve a rent; because the lessor may distrain the cattle upon the land. And so a reversion or a remainder of lands or tenements may be granted reserving a rent, for the apparent possibility that it may come in possession" (w). So a rent may be granted out of a reversion expectant upon a term of years, although no distress can be made during the term; and the grantee may have a receiver, or may have a sale of an adequate portion of the reversion to pay the rent (x).

Rent of personal chattels.

Upon the same principle a rent cannot be reserved out of goods or chattels personal. A lease of goods reserving a rent might give a personal remedy, but not a power of distress. But upon a lease of land together with goods and chattels at a rent reserved, the whole rent may be distrained upon the land; as where land is let with stock upon it; or upon a letting of a furnished house or lodging (y). So in the case of a lease of a factory or part of a factory, together with steam power, gas, and the like appliances for the use of the demised premises, a

<sup>(</sup>t) Doubitofte v. Curteene, Cro. Jac. 453; see 2 Wms. Saund. 304.

<sup>(</sup>u) Buszard v. Capel, 8 B. & C. 141; Capel v. Buszard, 6 Bing. 150. (v) Hardwicke, L. C., Stafford v.

Buckley, 2 Ves. sen. 178. (w) Co. Lit. 47a, 142a.

<sup>(</sup>x) Dawson v. Robins, L. R. 2 C. P. D. 38; 46 L. J. C. P. 62.

<sup>(</sup>y) Newman v. Anderton, 2 B. & P. N. R. 224; citing Spencer's Case, 5 Co. 17; Farewell v. Dickenson, 6 B. & C. 251. See Salmon v. Matthews, 8 M. & W. 827.

rent reserved for the whole is considered as issuing out of the fixed property, and attended with the right of distress (z).

Some rents service have received special designations. Fee farm Fee farm is rent in perpetuity reserved upon a grant in fee rent. simple. "After the statute of quia emptores granting in fee farm, except by the king, became impracticable; because the grantor parting with the fee is by operation of that statute without any reversion, and without a reversion there cannot be a rent service" (a). Rent granted or reserved in perpetuity since the statute would be rent seck at common law, unless charged upon the land by an express clause of distress. As rent seck it would be distrainable only by virtue of the Statute 4 Geo. II. c. 28 (b).

The customary rents service of the freehold and copy- Rents of hold tenants of manors, when fixed or assized in amount by assize. custom or otherwise, were called rents of assize: in distinction to rents that remained arbitrary or variable. They Quit rents. were also called quit rents, because they were paid instead of all other services, of which the tenant thereby became discharged or quit. The rents of the freehold tenants were called the *chief rents* of the manor (c). The rents of the copyhold tenants are distrainable at common law (d). "Rack rent is only a rent of the full value of the tenement or near to it"; it is a popular expression with no technical significance (e). - Where quit rents have been paid, but, as is often the case, it has become uncertain out of what lands they are issuable and distrainable, the Court of Chancery, upon proof of payment within a reasonable time, will decree payment of all arrears and future pay-

<sup>(</sup>z) Selby v. Greaves, L. R. 6 C. P. 594; 37 L. J. C. P. 251. See Willes, J., Ib., and see Marshall v. Schoffeld, 52 L. J. Q. B. 58.

(a) Hargrave's Note (5) to Co. Lit. 143 b; ante, p. 376; Bradbury v. Wright, Dougl. 627, n.; Att.-Gen. v. Coventry, 1 P. Wms. 306.

<sup>(</sup>b) Ante, p. 374; Bradbury v. Wright, supra; Rivis v. Watson, 5 M. & W. 255.
(c) 2 Co. Inst. 19; 2 Blackst.

Com. 42.

<sup>(</sup>d) Laughter v. Humphrey, Cro. Eliz. 524; see ante, p. 377.

<sup>(</sup>e) 2 Blackst. Com. 43.

ments; and if necessary, the Court will provide a remedy by ascertaining the boundaries (f).

Apportionment by statute. By the "Act for the Inclosure of Land," 17 & 18 Vict. c. 97, ss. 10—14, it is provided that "where any lands or hereditaments are charged with any fee farm rent, rent seck, rent of assize, or chief rent, or other annual or periodical fixed rent or other certain payment, any persons respectively interested in such lands and in the said rent or other payment issuing therefrom may make application in writing to the commissioners," who are therein authorised "by order under their hands and seal to apportion the said rent or other fixed payment among all the lands charged with the payment thereof, and also, where necessary, to determine the extent, identity, and boundaries of the land and hereditaments charged with such rent or payment."

Redemption of rents.

By the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, s. 45, "A quit rent, chief rent, rent charge, or other annual sum issuing out of land" may now be redeemed by payment or tender of a sum of money, certified by the Copyhold Commissioners as the amount of money in consideration whereof the rent may be redeemed, to the person entitled to the rent. "On proof to the commissioners that payment or tender has been so made, they shall certify that the rent is redeemed; and that certificate shall be final and conclusive; and the land shall be thereby absolutely freed and discharged from the rent." "This section does not apply to tithe rent charge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes; or to any sum or payment issuing out of land not being perpetual."

<sup>(</sup>f) Bridgewater v. Edwards, 6 Bro. P. C. 368; Duke of Leeds v. Fowell, 1 Ves. sen, 171; ante, p. 10.

## § 2. Rent charge and Annuity.

Rent charge—grant of rent charge—grant of distress—Bills of Sale Act, 1878.

Reservation of rent upon grant in fee-upon assignment of termseverance of rent service and reversion.

Limitations of rent charge-estate tail-disentailment.

Seisin, entry and occupancy of rent.

Rent as real or personal estate—arrears of rent.

Annuity.

Annuity charged upon land-upon rents and profits of land.

Limitation of annuity-in fee-for life-annuity for maintenancetrust to buy annuity-gift of annual income.

Charge of annuity in administration of assets upon real or personal estate

Registration of annuity and rent charge.

A rent charge may be created by the owner of land Rent charge. granting a rent out of it with an express power to distrain upon the land; or by the owner granting or assigning all his estate in the land, leaving no reversion, but reserving a rent with power to distrain; or by the owner of a reversion with rent service dissevering the rent service from the reversion and tenure of the land (a).

"If a man seised of certain land grant, by a deed poll Grant of or by indenture, a yearly rent to be issuing out of the same land to another in fee, or in tail, or for term of life, with a clause of distress, then this is a rent charge; and if the grant be without clause of distress, then it is a rent seck" (b). As a rent seck it is distrainable by the statute 4 Geo. II. c. 28 (c). In the same manner a rent charge may be devised by will (d).—A rent charge may be granted out of a term of years; and it may be granted for the life of the grantee, so as to be a charge during the term, if the grantee so long live; and in such case the grantee hath but

<sup>(</sup>a) Ante, p. 373; post, p. 387.(b) Lit. s. 218.

<sup>(</sup>c) Ante, p. 374; Dodds v. Thomp-

son, L. R. 1 C. P. 133; 35 L. J. C. P. 97.

<sup>(</sup>d) See ante, p. 375.

a chattel (e). "When a rent is granted out of land in fee and out of a term of years, to have and perceive to the grantee for the term of his life, this, as an estate of freehold according to the purport of the deed, cannot issue out of the term for years, but out of the land which the grantor hath in fee simple only" (f).

Grant of distress.

If the owner of land grant to another, that if he be not yearly paid a certain sum, then it shall be lawful for him to distrain upon the land, this is a good rent charge, because the land is charged with the rent by way of distress; but the person of the grantor cannot be charged, because he doth not grant any rent, but only that the grantee may distrain (q). If land be demised with a reservation of rent, and it is further agreed in the same deed that if the rent be behind the lessor may distrain for the same in certain other land, both the lands are charged. the one with the rent service, and the other with a distress for the rent by way of penalty (h). And the latter would be chargeable with the distress as against an assignee who took it with notice (i). "If a man seised of lands in fee bindeth his goods and lands to the payment of a yearly rent to A., this is a good rent charge with power to distrain. albeit there be no express words of charge, nor to distrain" (j). If he charge his goods only upon certain land, it is not a distress properly so called, but operates only by wav of covenant or licence for taking the goods (k).

Bills of Sale Act. By the Bills of Sale Act, 1878, 41 & 42 Vict. c. 31, s. 6, "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given by way of security for any debt or advance, and whereby any rent is reserved or made payable as a mode of providing

<sup>(</sup>e) Butt's Case, 7 Co. 23 a; Saffery v. Elgood, 1 A. & E. 191; post, p. 391.

<sup>(</sup>f) Butt's Case, supra. (g) Litt. s. 221; Co. Lit. 46 b;

<sup>7</sup> Co. 24 a, Butt's Casc.
(h) Co. Lit. 147 a; 7 Co. 23 b,
Butt's Case.

<sup>(</sup>i) Daniel v. Stepney, L. R. 9 Ex. 185.

<sup>(</sup>j) Co. Lit. 147 a.

<sup>(</sup>k) Freeman v. Edwards, 2 Ex. 732; 17 L. J. Ex. 258. See Re Sankey Brook Coal Co., L. R. 12 Eq. 472; 41 L. J. C. 119.

for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale of any personal chattels which may be seized or taken under such power of distress." This enactment applies to the attornment clause in a mortgage whereby the mortgagor in possession attorns tenant to the mortgagee; though it does not apply to the power of distress incident by common law to the rent service reserved in a lease (1). An agreement for letting a publichouse, stipulating for the exclusive supply of goods by the lessor, and for power to distrain for money due for such goods supplied, was held to be within the Bills of Sale Acts, and must conform to those Acts in form, registration and other requirements (m).

After the passing of the Statute of Quia Emptores a con-Reservation veyance in fee simple created no new tenure between the of rent upon grant in fee. grantor and the grantee, and therefore a rent reserved upon the grant was not rent service and had no common law right of distress. But the reservation of rent may be attended with an express clause, that if the rent be in arrear, it shall be lawful for the grantor or his heirs to distrain: the rent then becomes a rent charge, because the land is charged with the rent by the distress. tenant in fee simple grant away the land for a particular estate as for life or in tail with remainder in fee, or for several particular estates in succession with remainder in fee, leaving no reversion, but reserving a rent, it is not rent service; but it may be made a rent charge by an express clause of distress (n).—If a lessee for a term of Upon assignyears assign the whole term, or underlease for the whole ment or underlease term, reserving rent, but leaving no reversion, the rent is of term. not rent service and is not distrainable at common law,

<sup>(1)</sup> Re Willis, L. R. 21 Q. B. D. 384; Hall v. Comfort, L. R. 18 Q. B. D. 11; 56 L. J. Q. B. 185; (n) Pulbrook v. Ashby, 56 L. J. Q. B. 376. (n) Lit. ss. 215—217; ante, p. ante, p. 379.

unless there be an express clause of distress (o). But such rent would be recoverable by action of debt during the continuance of the term, or upon a covenant to pay the It is assignable, and the statute of 4 Anne, c. 16, s. 9, dispenses with the attornment of the tenant (p).

Severance of

A rent originally reserved as rent service incident to the and reversion, reversion of the land demised, may become dissevered from the reversion, by the landlord granting away the rent and reserving the reversion; or by the landlord granting away the reversion and expressly reserving the rent. In such cases the distress which was an incident of rent service and impliedly annexed to the reversion is lost at common law; the rent becomes a rent seck charged upon the land, and distrainable only by the statute 4 Geo. II. c. 28 (q). grant of the reversion passes the rent as incident to it, unless the rent is expressly reserved; but a grant of the rent does not pass the reversion (r). A devise of "rents" in a will may sometimes be construed to mean the reversion to which the rents are incident, according to the intention appearing in the will (s).

Limitations of rent charge.

The grant of a rent charge, which is an incorporeal hereditament, must be made by deed; and the terms of limitation, like those of rent service, are construed strictly according to the general rules of construction applied to limitations of real estate (t).—A rent charge may be limited by way of use, upon which the Statute of Uses will operate to vest the legal estate, as by limiting land to A. and his heirs, to the use that B. shall have an annual rent out of the same; or by granting a rent out of the land to A. and his heirs to the use of B.; in which cases the statute will

<sup>(</sup>o) Ante, p. 377; Parmenter v. Webber, 8 Taunt. 593; Preece v. Corrie, 5 Bing. 24; Pascoe v. Pascoe, 3 Bing. N. C. 898.
(p) Poultney v. Holmes, Strange, 405; Baker v. Gostling, 1 Bing. N. C. 19; Williams v. Hayward, 28

L. J. Q. B. 374; post, p. 472. (q) Lit. ss. 225—229, ante, p. 374. (r) Lit. s. 229.

<sup>(</sup>s) Kerry v. Derrick, Cro. Jac. 104; Maundy v. Maundy, 2 Stra.

<sup>(</sup>t) Ante, p. 380.

execute the uses, and with attendant remedies of distress and entry, if such remedies be expressly declared as uses (u). If it be further declared that the cestui que use is to hold the rent to the use or upon trust for another, the latter uses are not operated upon by the statute, but are trusts or equitable interests only (v).—If a rent be granted to one and his heirs, and the power to distrain to him only, this is a rent charge for his life and a rent seck after, the power to distrain not being extended to the heirs; so with a power to enter for non-payment of the rent (w).

Rent may be limited for an estate tail, being a "tenement" Estate tail. within the Statute De Donis, 13 Edw. I. c. 1, West. 2. "This is the only word which the said statute that created estates tail useth; and it includeth not only all corporate inheritances, which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to or exerciseable within the same, though they lie not in tenure; therefore all these without question may be intailed. As rents, estovers, commons, or other profits whatsoever granted out of land "(x).—Estates tail in rents Disentailwere formerly barred by Fines and Recoveries; they are expressly included in the Act for the Abolition of Fines and Recoveries, 3 & 4 Will. IV. c. 74, and may now be disentailed and converted into fee simple by a deed under that Act. Where the rent is originally limited to the grantee for an estate tail, with remainder to another in fee, it is a perpetual rent, and the tenant in tail may bar the remainder and enlarge his estate tail in the rent into a fee simple absolute. But where the rent is originally granted for an estate tail only, it is limited to the continuance of his issue in tail; the tenant in tail may by a disentailing deed convert his estate in the rent into a

<sup>(</sup>u) 27 Hen. 8, c. 10, ss. 1, 4, 5; 1 Sanders on Uses, 4th ed. 107; 2 Ib. 28. See Havergill v. Hare, Cro. Jac. 510, as to entry; Cook v. Herle, 2 Mod. 138, as to distress.

<sup>(</sup>v) Ante, Vol. I. pp. 120, 125. (w) Co. Lit. 147 b; Hassell v. Gowthwaite, Willes, 507. (x) Co. Lit. 20 a.

determinable or base fee during the continuance of issue, but he cannot enlarge it into a fee simple (y). service be reserved upon a grant of land for an estate tail, the tenant in tail of the land can bar the reversion, but he cannot bar the rent, because it is a separate tenement distinct from the land (z). Tenant in tail of land cannot grant a rent charge out of the land as against the issue in tail, without executing a disentailing assurance (a).

Seisin of rent.

Rent, as being an incorporeal hereditament, is incapable of seisin, entry or occupancy; but for some purposes payment of rent is a possession equivalent to seisin (b). Formerly seisin was necessary to maintain an assize or other real action; and payment of rent was a sufficient seisin for this purpose (c). Payment of rent was also sufficient seisin to create a new root of descent under the old law of inheritance, which traced descent from the person last seised (d). Upon the grant of a rent charge at common law the mere delivery and acceptance of the deed of grant give no actual seisin or possession of the rent; but if the grant be made by a deed operating under the Statute of Uses the grantee is "deemed and adjudged in lawful possession" of the rent by the words of the statute, which expressly includes "rents, reversions and other hereditaments." The distinction is important with reference to the "actual possession". of a rent charge required for the qualification of a county voter under the Reform Act, 2 Will. IV. c. 45, s. 26 (e).

<sup>(</sup>y) Butler's note to Co. Lit. 298 a; Smith v. Barnahy, Carter, 52; Anon., 12 Mod. 513; Chaplin v.

Anon., 12 Mod. 513; Chapim v. Chaplin, 3 P. Wms. 229.
(2) White v. West, Cro. Eliz. 792.
(a) Lambert v. Austin, Cro. Eliz. 333; Fairfax v. Derby, 2 Vern. 612.
(b) Lit. ss. 233—240; Co. Lit. 160 a; Druitt v. Christchurch, L. R. 12 Q. B. D. 365; 53 L. J. Q. B. 177.

<sup>(</sup>c) Lit. s. 233; Co. Lit. 153 α, 160 a. Real actions were abolished by 3 & 4 Will. 4, c. 27, s. 36.

<sup>(</sup>d) Co. Lit. 15 b; ante, Vol. I.

<sup>(</sup>c) Co. Lit. 160 a; ante, Vol. I. p. 103; Heelis v. Blain, 18 C. B. N. S. 90; 34 L. J. C. P. 88; Had-field's Case, L. R. 8 C. P. 306; 42 L. J. C. P. 146; Orme's Case, L. R. 8 C. P. 281; 42 L. J. C. P. 38.

-For the reason that rent does not admit of entry, if a Entry. rent charge be granted upon condition, and the condition be broken, the rent is ipso facto extinct without entry; although entry is in general necessary to divest a freehold in possession upon the breach of a condition (f).—Also, in Occupancy. the case of a rent pur autre rie and death of the tenant pending the life, there can be no general occupancy; but there may be a special occupant by the express words of the grant, (though not properly called an occupant but rather a special grantee), or under the statute 1 Vict. c. 26, s. 6, (repealing but substantially re-enacting the statute 29 Car. II. c. 3, s. 12,) which expressly includes incorporeal hereditaments (q). A rent reserved upon an assignment of an estate pur autre vie is a rent charge pur autre vie, which passes to the heir or executor of the assignor, upon his death pending the life, according to the terms of the reservation (h).

Rent charge limited for an estate of freehold is real Rent as real estate; and if the land is of customary tenure, the rent estate. follows the rules of the tenure; as the tenure of ancient demesne, or of gavelkind, or of Borough English (i). A rent charge pur autre vie is a freehold estate; but in case of the death of the owner pending the life without leaving a special occupant, it passes to the executor, to be applied and distributed as personal estate, by the statute 1 Vict. c. 26, s. 6 (j).—Rent charge granted for a term of years, and rent charge granted out of a term of years, though limited for the life of the grantee, are personal estate, and pass to the executor of the deceased grantee, together with the rights of distress (k).—Rent service follows the

<sup>(</sup>f) Co. Lit. 218 a; ante, Vol. I. p. 225. P. 220. (g) Co. Lit. 41 b, 388 a; Hassel v. Gowthwaite, Willes, 500; Bear-park v. Hutchinson, 7 Bing. 178; Chatfield v. Berchtoldt, L. R. 7 Ch. 192; 41 L. J. C. 255; ante, Vol. I. p. 193.

<sup>(</sup>h) Jenison v. Lexington, 1 P. Wms. 555.

<sup>(</sup>i) Robinson on Gavelkind, 79. See Knolles' Case, Dyer, 5 b.

<sup>(</sup>j) Chatfield v. Berchtoldt, L. R. 7 Ch. 192; 41 L. J. C. 255.
(k) Butt's Case, 7 Co. 23 a; Saffery

v. Elgood, 1 A. & E. 191.

Arrears of rent.

nature of the reversion to which it is incident; it is real or personal estate, and passes to the heir or executor, with the reversion (1). Rent service reserved upon a lease for years, and severed from the reversion, becomes a rent charge for years, and is personal estate (m).—Arrears of rent, whether rent charge or rent service, accrued due at the time of death are personal estate, and pass to the executor; and so are apportionments of rent to the death of the testator (n). And now the executor has by statute the like remedy of distress for such arrears as the testator had in his lifetime (o). At common law neither the heir nor the executor of the owner of a freehold rent had any right to distrain for arrears accrued due at his decease (p).

Annuity.

"An annuity is a yearly payment of a certain sum of money granted to another in fee, for life, or for years, charging the person of the grantor only." An annuity as a mere personal obligation at common law did not charge the land of the grantor in his lifetime; nor did it charge the heir of the deceased grantor, although he took assets by descent, unless the heir was expressly bound in the grant or instrument of obligation (q). Now by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 59, a contract, bond, or obligation under seal, made after the commencement of the Act, "though not expressed to bind the heirs, shall operate in law to bind the heirs, and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed;" but "only if and so far as a contrary intention is not expressed."—A rent charge, as being

Ad. 849. See post, p. 418. (q) Co. Lit. 144 b.

<sup>(</sup>l) Ante, p. 380. Sacheverell v. Froggatt, 2 Wms. Saund. 371.
(m) Knolle's Case, Dyer, 5 b.
(n) Brownrigg v. Pike, L. R. 7
P. D. 61; 51 L. J. Prob. 29. See Duppa v. Mayo, 1 Wms. Saund.  $28\hat{b}$ , cited post, p. 426; apportionment, post, p. 421.

<sup>(</sup>o) 32 Hen. 8, c. 37, ss. 1, 4; 3 & 4 Will. 4, c. 42, ss. 37, 38. (y) Co. Lit. 162 a; Ognel's Case, 4 Co. 48b; Edrich's Case, 5 Co. 118 a; Prescott v. Boucher, 3 B. &

an annuity, imports the remedy by personal action against the grantor, unless the personal liability is expressly excepted; and the grantee has the election to proceed by action against the grantor, or by distress for the rent in arrear; but he cannot do both together (r). The grant of a mere power of distress upon land for an annual sum impliedly creates a rent charge, but without personal liability of the grantor (s). Upon a reservation of rent service the grantee or lessee of the land was not chargeable personally by writ of annuity at common law, because the words of reservation were taken as those of the grantor only and not of the grantee (t); but rent service was recoverable at common law by a real action; and under the statute 8 Anne, c. 14, s. 4, by an action of debt (u).

An annuity expressly charged upon land is in the nature Annuity of a rent. If it is charged by a clause of distress, it charged upon land. becomes a rent charge; if it is charged upon land generally without any power of distress, it is a rent seck, to which the statute 4 Geo. II. c. 28 applies and gives a power of distress (v).—An annuity charged generally upon land pre- Upon rents sumptively charges not only the annual rents and profits and profits of but also the land itself (u); it may be charged upon the annual rents and profits only, without recourse to the corpus of the land (x); or it may be charged primarily upon the rents and profits, with recourse to the corpus for the annual deficiency (y); or it may be charged upon the annual rents and profits, with a cumulative charge upon the rents and

<sup>(</sup>r) Lit. ss. 219, 220; see Bodwell v. Bodwell, Cro. Car. 171; post, p.

<sup>(</sup>s) Ante, p. 386. (t) Co. Lit. 144 a.

<sup>(</sup>t) Co. Lit. 144 a.

(u) Post, p. 472.

(v) Ante, p. 374; Hardwicke,
L. C., Stafford v. Buckley, 2 Ves.
sen. 177; Buttery v. Robinson, 3 Bing.
392; Sollory v. Leaver, L. R. 9 Eq.
22; 40 L. J. C. 398.

<sup>(</sup>w) Pearson v. Helliwell, L. R. 18

Eq. 411; Howarth v. Rothwell, 30 Beav. 516; 31 L. J. C. 449.

<sup>(</sup>x) Foster v. Smith, 1 Ph. 629; Stelfox v. Sugden, Johns. 234; Yates v. Yates, 28 Beav. 641; 29 L. J. C. 874; Baker v. Baker, 6 H. L. C. 616; 27 L. J. C. 417; Michell v. Wilton, L. R. 20 Eq. 269; 44 L. J.

<sup>(</sup>y) Re Grant, 52 L. J. C. 552; Re Mason, L. R. 8 C. D. 411; 47 L. J. C. 660.

profits of succeeding years until the arrears of the annuity are discharged (z). The incidence of the charge in these respects depends upon the construction of the terms in which it is granted.

Limitation of annuities--in fee;

"If an annuity be granted to a man and his heirs, it is a fee simple personal," or "a personal inheritance which the law allows to descend to the heirs;" and "not only the grantee, but his heir and his or their grantee also shall have a writ of annuity." It is assignable, and devisable by will; it passes by a will of personal estate and by a residuary bequest of personalty, but not to executors virtute officii (a). A limitation of an annuity "for ever," without the limitation "to the heirs," has not the like effect; it is not inheritable, but passes to the executor as a mere annuity (b). A limitation of an annuity to a man and "to the heirs of his body" is construed like a fee simple conditional upon issue; and upon his satisfying the condition of having issue it becomes his absolute personal property. It does not admit of a limitation in remainder (c). -The grant of an annuity to a person without words of limitation is presumptively an annuity for his life only. Also the grant of an annuity to one expressly for life, with remainder to another without words of limitation, is presumptively given to the latter for his life only; "the duration of the life of the first taker is expressed, not for the purpose of limiting the gift to the first taker, but of limiting the commencement of the gift to the second or successive takers" (d). The Wills Act, 1 Vict. c. 26,

for life.

<sup>(</sup>z) Booth v. Coulton, L. R. 5 Ch. 684; 39 L. J. C. 622; Birch v. Sher-

<sup>(</sup>a) Co. Lit. 2 a, 144 b; Stafford v. Buckley, 2 Ves. sen. 177; Aubin v. Daly, 4 B. & Ald. 59; Gerard v.

Boden, Hetley, 80.

<sup>(</sup>b) Taylor v. Martindale, 12 Sim.

<sup>(</sup>c) Co. Lit. 20 a; Turner v. Turner, Ambl. 776; Stafford v. Buckley,

supra; ante, Vol. I. p. 35.
(d) Fry, J., Blight v. Hartnoll,
L. R. 19 C. D. 297; 51 L. J. C.
164; dissenting from Evans v.
Walker, L. R. 3 C. D. 211. Blewitt

s. 28, makes no difference in the creation of an annuity in this respect (e). But the grant to a person of an annuity for a term of years, or pur autre vie, or until a certain event, as the death or marriage of another, without further limitation, is not also impliedly limited to the life of the annuitant; and if he die within the term his executors will take the continuance of the annuity (f). The grant of an Annuity for annuity to children "for their maintenance and educa- maintenance. tion" is construed as giving them the annuity for their lives, and not during minority only; because "maintenance would certainly last beyond minority, and education would not necessarily end with minority "(g).

A direction to trustees or executors to purchase an Trust to purannuity for a person is presumptively construed as an annuity for life only; but if the trust be to apply certain property, or the proceeds of the sale of property, in the purchase of an annuity of a certain amount for a person, it is presumptively a perpetual annuity (h). A direction merely to appropriate sufficient property to answer an annuity is not sufficient to extend it beyond the life of the annuitant (i); nor is a charge of the annuity upon property generally, for the property may be equally susceptible of a charge of an annuity for life or in fee, and there is no presumption that the duration of an annuity should correspond with the limits of the estate charged (/).—A gift Gift of annual of the annual income of property, or of a certain amount of the income is an absolute gift of the property out of which it issues, in perpetuity (k).

chase annuity.

(i) Kindersley, V.-C., Bignold v. Giles, 4 Drew. 343; 28 L. J. C. 358; Re Grove's Trusts, 1 Giff. 74; 28 L. J. C. 536; Re Taber, 51 L.

(j) Wilson v. Maddison, 2 Y. & C. C. 372. See Mansergh v. Campbell, 3 D. & J. 237; 28 L. J. C. 61. (k) Stokes v. Heron, 12 Cl. & F.

161; Blewitt v. Roberts, Cr. & Ph. 280; Pawson v. Pawson, 19 Beav. 146; 23 L. J. C. 954.

v. Roberts, Cr. & Ph. 274; Yates v. Maddan, 3 Mac. & G. 532. See Mansergh v. Campbell, 3 D. & J. 237; 28 L. J. C. 61.
(e) Nicholls v. Hawkes, 10 Hare, 342; 22 L. J. C. 255.
(f) Savery v. Dyer, Ambl. 139; Re Ord, L. R. 12 C. D. 22.
(a) Wilkins v. Jodrell. L. R. 13

<sup>(</sup>g) Wilkins v. Jodrell, L. R. 13 C. D. 564; 49 L. J. C. 26. (h) Kerr v. Middlesex Hospital, 2 D. M. & G. 575.

Charge of annuity in administration of assets.

Annuities given by will are in general treated as legacies, of the value of the annuity estimated at the testator's death (l). So, under a direction in a will to buy an annuity for a person, whether for life or in perpetuity, the annuitant is entitled to have the money value instead of the annuity, which he would himself be able to sell and convert into money (m). And if the annuitant die before the annuity is bought, his personal representative becomes entitled to the value (n). Hence in the administration of assets the personal estate is primarily liable to pay annuities, in the absence of intention appearing in the will to the contrary; and a mere charge of the annuity upon the real estate is not sufficient to show a contrary But an annuity may be charged upon intention (o). certain land primarily, by way of what is called a demonstrative legacy, with recourse to the personal estate only in case of deficiency of the land specifically charged therewith (p); or it may be charged exclusively upon land, as in the form of a rent charge upon specific land, with powers of distress and entry (q); or it may be charged proportionately upon both the real and personal estate, which is impliedly the case where they are constituted a mixed fund for payment of charges (r).—An annuity has no priority over other legacies merely because it is charged upon land, or secured by powers of distress and entry. An annuity bequeathed in bar of dower was held to have priority, if there were in fact any dowable lands discharged by it; but not otherwise (s).

Priority.

<sup>(</sup>l) Ward v. Grey, 26 Beav. 491; 29 L. J. C. 74; Malins, V.-C., Roper v. Roper, L. R. 3 C. D. 720.

<sup>(</sup>m) Stokes v. Cheek, 28 Beav. 620; 29 L. J. C. 922; Re Browne's Will, 27 Beav. 324.

<sup>(</sup>n) Day v. Day, 1 Drew. 569; 22 L. J. C. 878.

<sup>(</sup>o) Boughton v. Boughton, 1 H. L. C. 406; Yonge v. Furse, 20 Beav. 380; 24 L. J. C. 643; Re Muffett, Weekly Notes, 1888, p. 185.

<sup>(</sup>p) Mann v. Copland, 2 Madd. 223; Vickers v. Pound, 6 H. L. C. 885; 28 L. J. C. 16; Paget v. Huish, 1 H. & M. 663; 32 L. J. C. 468. (q) Poole v. Heron, 42 L. J. C. 348; Patching v. Barnett, 51 L. J. C.

<sup>(</sup>r) Allan v. Gott, L. R. 7 Ch. 439; 41 L. J. C. 571. (s) Roper v. Roper, L. R. 3 C. D.

By the Act for the better protection of purchasers, 18 Registration Vict. c. 15, s. 12 (substituted for the statutes 17 Geo. III. of annuity and rent c. 26, and 53 Geo. III. c. 141, which provided for the charge. registration of annuities and rent charges), it is enacted that:--"Any annuity or rent charge granted after the passing of this Act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors," unless and until a memorandum of the same shall be registered to the effect and in the manner provided in the Act. Sect. 14 provides that the Act shall not extend to require the registry of annuities or rent charges given by will.—The enactment does not obviate the effect of notice: and a grant of an annuity or rent charge, not registered, is not therefore void against a purchaser or mortgagee who takes the land with notice of the charge, but the annuitant retains his priority (t). An agreement to grant an annuity is not within the statute, and may be specifically enforced against the grantor or his representatives, as against creditors, without registration (u); and a bond securing payments of interest upon a principal debt is not within the statute (r).

<sup>(</sup>t) Greaves v. Tofield, L. R. 14 C. D. 563; L. R. 50 C. 118. (v) Best, J., Winter v. Mouseley, 2 B. & Ald. 806. (u) Nield v. Smith, 14 Ves. 491.

## § 3. TITHE RENT CHARGE.

Tithe rent charge-Commutation Act.

Valuation and apportionment of tithe.

Corn average-valuation of rent charge.

Discharge of tithe and substitution of rent charge.

Remedy by distress-by writ of possession-no remedy by sale.

Extraordinary tithe-Redemption Act.

Tithe rent charge as freehold estate—tithe rent charge upon copyhold.

Merger of tithe rent charge.

Grant or lease of land subject to rent charge—liability of tenant to pay rent charge—contribution from co-owners of land charged.

Assessment of tithe rent charge for rates and taxes.

Tithe rent charge. By the "Act for the Commutation of Tithes in England and Wales," 1836, 6 & 7 Will. IV. c. 71, a special kind of rent charge was created, in commutation of the ancient prescriptive charge of tithe upon the produce of land. The Act abolished tithe, and substituted a rent charge based upon statutory authority and subject to statutory rules; thereby superseding the earlier law of tithe, which, therefore, has no longer any practical interest. The following are the principal results and provisions of the Commutation Act (a).

Valuation of tithe.

Under sect. 37, the clear average value of the tithes of every parish, according to the average of seven years

(a) A Bill is now before Parliament, entitled "The Tithe Rent Charge Recovery and Variation Bill," which, if passed into an Act, will make material alterations in the law relating to the tithe rent charge, as stated above. The chief proposed alterations are, the abolition of distress for the recovery of tithe rent charge; and the substitution of proceedings in the County Court, involving an inquiry into the net profits of the land to the owner, to the amount of which the rent charge is to be restricted; upon which proceedings

the judge may make an order for payment, to be enforced by a receiver, but not personally against the owner or occupier, nor by sale of the land. An alternative remedy is by injunction to the occupier to pay the rent charge due, and not to pay any rent to the landlord until the rent charge has been paid to the tithe owner. The Bill further proposes to assess the rent charge in future upon a triennial average of prices, instead of the septennial average provided by the Tithe Commutation Act.

preceding, was awarded "as the sum to be taken for calculating the rent charge to be paid as a permanent commutation of the said tithes." Under sects. 50-55, the Apportiontotal amount awarded for every parish was apportioned among the lands of the parish, having regard to their average titheable produce and productive quality, and a draft apportionment was made stating "the name or description and the quantity of the several lands; the names and description of the several proprietors and occupiers thereof; and the amount charged upon the said several lands, and to whom and in what right the same shall be respectively payable."

Sect. 56 provided that immediately after the passing of Corn average. the Act, and in the month of January in every year an advertisement should be inserted in the London Gazette. "stating what has been during seven years then next preceding the average price of an imperial bushel of British wheat, barley, and oats, computed from the weekly averages of the corn returns." And sect. 57, "that Valuation of every rent charge charged upon any lands by any ap- rent charge. portionment shall be deemed to be of the value of such number of imperial bushels of wheat, barley, and oats, as the same would have purchased at the prices so ascertained by the advertisement published immediately after the passing of this Act, in case one third part of such rent charge had been invested in the purchase of wheat, one third part in the purchase of barley, and the remaining third part thereof in the purchase of oats; and the respective quantities of wheat, barley, and oats, so ascertained shall be stated in the draft of every apportionment" (b).—By the "Corn Returns Act, 1882," 45 & 46 Vict. c. 37, s. 9, the Board of Trade is required to cause to be published in the London Gazette the weekly.

<sup>(</sup>b) In the following year, 1837, it was declared by statute, 1 Vict. c. 69, s. 7, "that the prices at which the conversion from money into corn is to be made, according to

the provisions of the said Act, are 7s.  $0\frac{1}{4}d$ . for a bushel of wheat, 3s.  $11\frac{1}{2}d$ . for a bushel of barley, and 2s. 9d. for a bushel of oats."

quarterly, annual and septennial average prices of corn; and to state the annual and septennial average for the imperial bushel; and by s. 10, the statement of the septennial average price so published is substituted for the advertisement referred to in s. 56 of the above statute of Will. IV.; which section is also repealed.

Discharge of tithe.

Substitution of rent charge.

Sect. 67 enacted that the land "shall be absolutely discharged from the payment of all tithes"; -- "and instead thereof there shall be payable thenceforth to the person mentioned in the said apportionment a sum of money equal in value, according to the prices ascertained by the then next preceding advertisement, to the quantity of wheat, barley, and oats respectively mentioned therein, in the nature of a rent charge issuing out of the lands charged therewith; and such yearly sum shall be payable by two equal half-yearly payments; and the sum of money thenceforth payable in respect of such rent charge shall vary so as always to consist of the price of the same number of bushels of wheat, barley, and oats respectively, according to the prices ascertained by the then next preceding advertisement: provided that nothing herein contained shall be taken to render any person whomsoever personally liable to the payment of any such rent charge."

Remedy by distress.

By sect. 81, "In case the said rent charge shall be in arrear and unpaid for the space of twenty-one days, it shall be lawful for the person entitled, after having given or left ten days' notice in writing at the residence of the tenant in possession, to distrain upon the lands liable to the payment thereof for all arrears of the said rent charge, and to dispose of the distress and otherwise act in relation thereto as any landlord may for arrears of rent: provided that not more than two years' arrears shall at any time be recoverable by distress" (c).

Writ of possession.

By sect. 82, "In case the said rent charge shall be in

post in a registered letter. 23 & 24 Vict. c. 93, ss. 29, 30.

<sup>(</sup>c) The owner of the rent charge is entitled to 2s. 6d. for each notice to distrain; and may send notice by

arrear and unpaid for the space of forty days, and there shall be no sufficient distress on the premises liable to the payment thereof,"-" the owner of the rent charge may sue out a writ of habere facias possessionem, directed to the sheriff, commanding him to cause the owner of the rent charge to have possession of the lands chargeable therewith, until the arrears of rent charge, and costs of the writ and execution, and of cultivating and keeping possession of the lands, shall be fully satisfied: provided always that not more than two years' arrears over and above the time of such possession shall be at any time recoverable." And by a later Act power is given to the owner of the rent charge, having taken possession under such writ, "to let the land for any period not exceeding one year in possession at such rent as can be reasonably obtained for the same" (c).—By sect. 85, the powers of distress and entry given by the Act are made to extend to every part of the land situate in the parish occupied by the same person as is the occupier of the lands on which such rent charge is in arrear, whether occupied by him as the owner or as tenant holding under the same landlord.

The rent charge being the creation of the Act has no other No remedy by remedies than those given by the Act. There is no jurisdiction in equity to make it a charge upon the inheritance of the land, or to extend the charge beyond the terms of the Act. Consequently in the event of the statutory remedies failing by reason of there being nothing upon the land to distrain, and the land being unproductive for occupation, the owner of the rent charge cannot claim to have the land sold for satisfaction of arrears (d). This is in accordance with the nature of the original tithe which was taken from the produce of the land only, and was no charge upon the land itself. So before the commutation there was no personal liability in respect of the tithe; as now there is no personal liability for payment of the rent charge (e).

<sup>(</sup>c) 5 & 6 Vict. c. 54, s. 12. (d) Bailey v. Badham, L. R. 30 C. D. 84; 54 L. J. C. 1067.

<sup>(</sup>e) Sect. 67, ante, p. 400; Cockburn, J., Bedford v. Sutton Coldfield, 3 C. B. N. S. 476.

Extraordinary tithe. In the case of land cultivated as hop grounds, orchards, fruit, plantations and market gardens, it was further provided that the amount of rent charge apportioned shall be distinguished into two parts, which shall be called the ordinary charge and the extraordinary charge, and the extraordinary charge shall be a rate per imperial acre; and all lands which shall cease to be so cultivated shall be charged only with the ordinary charge upon such lands, and all lands which shall be newly so cultivated shall be charged with an additional amount of rent charge per imperial acre equal to the extraordinary charge (f).

Redemption Act.

By the Extraordinary Tithe Redemption Act, 1886, 49 & 50 Vict. c. 54, s. 1, "No extraordinary charge shall be levied on any hop ground, orchard, fruit, plantation or market garden, newly cultivated as such after the passing of this Act." And by sects. 2, 3, 4, it is enacted that the capital value of the extraordinary charge payable at the date of the Act shall be estimated; and that the land shall be charged with a rent charge of four per cent. on such capital value in lieu of the extraordinary charge, and which shall be recoverable in the same way as rent charge in lieu of ordinary tithe. Sect. 5 provides for redemption of the extraordinary charge, or of the substituted rent charge, by payment of the amount of the capital value.

Tithe rent charge as freehold estate. The Commutation Act, s. 71, declares that "every estate for life or other greater estate in any such rent charge shall be taken to be an estate of freehold; and every estate in any such rent charge shall be subject to the same liabilities and incidents as the like estate in the tithes commuted for such rent charge." Accordingly the statutory rent charge is an hereditament descendible and devisable in the same manner as freehold land. It is real assets in the hands of the heir or devisee of a deceased owner. It may be limited upon conveyance or by will for the same estates and by the same terms as freehold land.

<sup>(</sup>f) 6 & 7 Will. 4, c. 71, s. 42; 2 & 3 Viet. c. 62, ss. 26-33.

But being an incorporeal hereditament it cannot be conveyed without deed. It is within the Act for the Abolition of Fines and Recoveries, 3 & 4 Will. IV. c. 74, which expressly includes tithes, and it may be disentailed by a deed under that Act.—The tithe rent charge upon land of Tithe rent copyhold or other customary tenure is not affected by charge upon copyhold. manorial customs, because the tithe for which it was substituted, as a lay hereditament, must have originated within legal memory, having previously belonged to ecclesiastical corporations to which descents and other customary rules did not apply. Accordingly it is not affected by the special rules of gavelkind or borough English tenure (q).

The tithe rent charge retains a special quality of the Merger of original tithe in being an hereditament distinct from the tithe rent charge. land; so that it is not, like an ordinary rent charge, merged and extinguished in the ownership of the land where they vest in the same person; as it was said of tithes "no unity of possession can either extinguish or suspend them "(h). By the Commutation Act, s. 71, it is expressly declared that "no such rent charge shall merge or be extinguished in any estate of which the person entitled to such rent charge may be seised or possessed in the lands on which the same shall be charged." But provision is made by the same section for tenant in fee simple or in fee tail merging and extinguishing the tithe rent charge by a declaratory deed. And further provision is made for facilitating merger by 1 & 2 Vict. c. 64, and by 9 & 10 Vict. c. 73, ss. 18, 19.—Provision is made for redeeming Redemption. the rent charge by 9 & 10 Vict. c. 73, ss. 1, 2; 23 & 24 Viet. c. 93, s. 31; and by 41 & 42 Viet. c. 42.

Where the owner of land and of the tithes of the same Grant or lease land granted and conveyed the land, "together with all of land subprofits, hereditaments and appurtenances to the premises

ject to tithe.

<sup>(</sup>g) Doe v. Bishop of Llandaff, 2 (h) 11 Co. 13 b, Priddle's Case. B. & P. N. R. 491.

belonging or appertaining," it was held that the tithe did not pass by the conveyance, because it was a distinct hereditament which did not belong or appertain to the land (i). For the same reason a lease made by the clerical incumbent of a rectory, of glebe land, rendering a certain rent in discharge of all demands, but not mentioning the tithe, was held not to give possession of the land tithe free (j). And a demise of land and tithe by an instrument not under seal was held ineffectual to pass the tithe, as being a distinct incorporeal hereditament which could only be conveyed by deed; and consequently an entire rent reserved, being partly for the land and partly for the tithes, could not be distrained for upon the land, unless separately apportioned (k).

Liability of tenant to pay rent charge.

But the Commutation Act, s. 80, has now provided that "every tenant or occupier who shall occupy any lands by any lease or agreement subsequent to such commutation, and who shall pay any such rent charge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord and shall be allowed the same in account with the said landlord." Therefore a lease or agreement for a lease of land, made since the Act and whether by deed or not, is presumptively free of the rent charge; and though expressed to be "tithe free" in the terms of the lease or agreement, such words are mere surplusage, and the whole rent is appropriated to the land (1).—The tenant or occupier may, however, renounce his presumptive right to deduct payment of the rent charge from the rent, and so make himself liable for the payment as between himself and his landlord (m). But there is no personal liability of the occupier or of the landlord to pay the tithe owner, whose only remedies are those given by the statute by distress or occupation of the land (n). Hence if goods

<sup>(</sup>i) Chapman v. Gatcombe, 2 Bing. N. C. 516; see Phillips v. Jones, 3 B. & P. 362.

<sup>(</sup>j) Parkins v. Hinde, Cro. Eliz.

<sup>(</sup>k) Gardiner v. Williamson, 2 B. & Ad. 336.

<sup>(</sup>l) Meggison v. Bowes, 7 Ex. 685; 21 L. J. Ex. 284.

<sup>21</sup> L. J. EX. 254. (n) Parish v. Sleeman, 1 D. F. & J. 326; 29 L. J. C. 96; Jeffrey v. Neale, L. R. 6 C. P. 240; 40 L. J. C. P. 191. (n) 6 & 7 Will. 4, c. 71, s. 67;

of an outgoing tenant after the expiration of his term, or goods of a third party, being upon the land, are distrained for the rent charge, which he is thus compelled to pay, he has no claim against the landlord or occupier to recover the money as paid to their use, because they are not discharged from any liability by the payment (o).—By Tenant leav-14 & 15 Vict. c. 25, s. 4, "If any occupying tenant of charge unland shall quit, leaving unpaid any tithe rent charge paid. which he was by the terms of his tenancy legally or equitably liable to pay, and the tithe owner shall give notice of proceeding by distress for recovery thereof, it shall be lawful for the landlord or the succeeding tenant or occupier to pay such tithe rent charge, and to recover the amount against such first named tenant or occupier in the same manner as if it were a debt by simple contract."

A right of contribution is given by statute between Contribution co-owners of land subject to the same rent charge. By from co-owners. 5 & 6 Vict. c. 54, s. 16, "In case any land charged with one amount of rent charge shall belong to two or more landowners in several portions, and the owner of any one of such portions or his tenant shall have paid the whole of such rent charge or any portion thereof greater than his first proportion," he or his tenant may proceed to claim contribution from the other landowners; jurisdiction is given to two or more justices of the peace to determine the proportion of contribution and to order payment of the amount with costs; and thereupon the claimant may take the like proceedings for enforcing payment of the amount and with the like restriction as to arrears as are given to the owner of the rent charge (p).

By the Commutation Act, s. 69, "Every rent charge Assessment of payable as aforesaid instead of the tithe shall be subject to for rates and

taxes.

ante, p. 400. See Willoughby v. Willoughby, 4 Q. B. 687; Christie v. Barker, 53 L. J. Q. B. 537.

<sup>(</sup>o) Griffinhoofe v. Daubuz, 5 E. & B. 746; 25 L. J. Q. B. 237. (p) The Queen v. Williams, 21
 L. J. M. 150.

all parliamentary, parochial, and county, and other rates, charges, and assessments in like manner as the tithes commuted for such rent charge have hitherto been subject." The assessment of the rent charge for income tax is made upon the net annual value, deducting rates and taxes and the necessary costs of collection (q).

## Section II. Extinction and Apportionment of Rents.

Release of rent-discharge of land from rent.

Merger of rent in the possession of the land charged—possession of part of the land—possession for limited estate—possession by act of law

Merger of rent service-merger of reversion to which rent incident.

Eviction of tenant by lessor—eviction by title paramount—eviction of grantor of rent charge.

Apportionment of rent—by partition of the rent—by partition of the reversion—partition by act of law—partition by tenant.

Apportionment of conditions—under the Conveyancing Act, 1881.

Apportionment of rent to time at common law—in equity—apportionment by terms of limitation.

Apportionment by statute—between lessor and lessee—between successive owners of rent.

Apportionment Act, 1870—rent apportioned between real and personal estate—between tenant for life and remainderman—between assignor and assignee of lease.

Release of rent to the tenant. A release of rent service by the landlord to the tenant of the land operates by way of extinguishment of the rent; "for the tenant cannot have service to be taken of himself, nor can one man be both lord and tenant" (a). A release of rent charge to the tenant of the land charged operates in the same manner; because "a man cannot have land and a rent issuing out of the same land" (b). If a man have a rent charge he may release to the tenant

<sup>(</sup>q) Stevens v. Bishop, L. R. 19 Q. B. D. 442; 57 L. J. Q. B. 283.

 <sup>(</sup>a) Lit. s. 479; Co. Lit. 280 a.
 (b) Lit. s. 480; Co. Lit. 280 a.

of the land more or less, and reserve part (c). And he may do the same with rent service (d).

At common law a release of part of the land from a Discharge of rent charge prima fucie discharged the whole land, and land from rent. extinguished the rent, because the rent being entire and issuing out of every part of the land, could not be thrown exclusively upon the rest of the land, nor apportioned to the several parts, without the consent of the owners of the land. An owner of land, upon the release of part from a rent, may make it chargeable upon the residue; which amounts to a new grant of a rent out of that part of the land (e).—Now by the statute 22 & 23 Vict. c. 35, s. 10, it is enacted that "the release from a rent charge of part of the hereditaments charged therewith, shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent charge out of the hereditaments released; without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release." Under this enactment a release of part of the land with the concurrence of the owner or owners of the unreleased part leaves the unreleased part primâ facie chargeable with the whole rent. A release of part of the land without the concurrence of the owner or owners of the unreleased part operates without prejudice to their rights, and therefore leaves the unreleased part chargeable with only a proportionate part of the rent; for the right of the owner of part of land chargeable with an entire rent, upon being compelled to pay more than his share, is to have contribution from the other owners, in proportion to their respective shares (f).

Rent, whether rent service or rent charge, is merged Merger of and extinguished by the owner of the rent acquiring pos- rent in pos- session of

land charged.

<sup>(</sup>c) Co. Lit. 148 α.
(d) Lit. s. 538.
(e) Co. Lit. 147 b.

<sup>(</sup>f) Booth v. Smith, L. R. 14 Q. B. D. 318; 54 L. J. Q. B. 119.

session of the land out of which the rent issues for an

Possession of part of the land.

estate equal to or greater than his estate or interest in the rent (g). But if the owner of the rent acquire possession of part only of the land, there is a difference in the effects upon a rent charge and upon a rent service. "If a man hath a rent charge to him and to his heirs issuing out of certain land, if he purchase any part of this to him and to his heirs all the rent charge is extinct and the annuity also; because the rent charge cannot by such manner be apportioned" (h). "If the grantee of a rent charge purchase parcel of the land, and the grantor by his deed, reciting the said purchase of part, granteth that he may distrain for the same rent in the residue of the land, this amounteth to a new grant, and the same rent shall be taken for the like rent or the same in quantity" (i).—So, if a person grant a rent charge upon certain land, and afterwards devises to the grantee of the rent charge a part of the land out of which it issues, which the devisee accepts, the whole rent charge is thereby extinguished; and that without regard to the intention of the testator (i). -If the owner of the rent acquire possession of the land for an estate less than his estate in the rent, the rent is suspended only, and not extinguished, and it will revive upon the determination of his possession of the land. Thus, a rent charge for life is suspended by the grantee accepting a lease for years of the land; and it revives upon the determination, forfeiture or surrender of the lease (k). And possession of part of the land under such circumstances suspends the rent for the whole (1).

Possession for limited estate.

If part of the land charged comes to the owner of the rent by descent, the rent is apportioned according to the value of the land, because the land comes to him not of his own act, but by course of law. So also if the rent

Possession by act of law.

<sup>(</sup>g) Freeman v. Edwards, 2 Ex. 732.

<sup>(</sup>h) Lit. s. 222; Co. Lit. 147 b. (i) Co. Lit. 147 b.

<sup>(</sup>i) Co. Lit. 147 b. (j) Dennett v. Pass, 1 Bing. N. C.

<sup>388.</sup> (k) Peto v. Pemberton, Cro. Car. 101.

<sup>(</sup>l) Co. Lit. 148 b; Hodgkins v. Robson, 2 Lev. 143; 1 Vent. 277.

comes by descent to the owner of part of the land, the rent is apportioned (m).

"But if a man which hath a rent service purchase Merger of parcel of the land out of which the rent is issuing, this rent service. shall not extinguish all, but for the parcel only. For a rent service in such case may be apportioned according to the value of the land" (n). "As if a man maketh a lease for life or years reserving a rent, and the lessee surrender part to the lessor, the rent shall be apportioned. So if the lessor recovereth part of the land in an action of waste, or entereth for a forfeiture in part, the rent shall be apportioned" (o). If the rent service be such that it cannot be apportioned, as the delivery of a horse, hawk, or other indivisible chattel, if the lessor purchaseth parcel of the land, the entire service is extinguished because it cannot be claimed for part only of the land (p).

Rent service being incident to the reversion of the Merger of demised estate was extinguished at common law by reversion to which rent merger of the reversion in the inheritance; as where service tenant for term of years demised for a less term at a certain rent, leaving in himself the reversion of the original term, and afterwards acquired the reversion in fee, or assigned the reversion of his term to the reversioner in fee, the rent service became extinguished with the reversion to which it was incident (q). But now by 8 & 9 Vict. c. 106, s. 9, it is enacted "that when the reversion expectant upon a lease of any tenements or hereditaments shall be surrendered or merged, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments shall, to the extent and for the purpose of preserving such incidents to and obligations on

<sup>(</sup>m) Lit. s. 224; Co. Lit. 149 b.
(n) Lit. s. 222.
(o) Co. Lit. 148 α.

<sup>(</sup>p) Lit. s. 222; and see Lit. s. 314; 6 Co. 1 b, Bruerton's Case;

<sup>8</sup> Co. 104 b, Talbot's Case.

<sup>(</sup>q) Webb v. Russell, 3 T. R. 393; Thorn v. Woolcombe, 3 B. & Ad. 586.

the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease."

Eviction of tenant by lessor.

If the lessor wrongfully enter upon the land demised and evict the lessee, the rent service is suspended so long as the eviction continues. And "if the lessor enter upon the lessee for life or years into part, and thereof disseise or put out the lessee, the rent is suspended in the whole, and shall not be apportioned for any part" (q). when the lessor enters lawfully into part, as upon a surrender or forfeiture or the like, the rent is apportioned (r). A mere trespass or a wrongful entry, without an eviction and expulsion of the lessee, is no answer to a claim for the full rent (s). The obstruction of an easement appurtenant to the demised premises is not such an eviction from any part of the premises as will operate a suspension of the rent or of any part of it (t).

Eviction by title paramount.

In the case of eviction by title paramount to the lease the rent service is apportionable according to the value of the land, and the lessor may distrain for an apportioned part; and the covenants of the lease are correspondingly apportionable (u). As, "if a man be seised of two acres of land, of one in fee simple and of another in tail, and make a lease for life or for years of both acres, reserving a rent; the donor or lessor dieth; the issue in tail avoideth the gift or lease; the rent shall be apportioned "(v). So, if a man lease land of which he is seised in fee, together with land which he has a power of leasing, at one entire rent, and the power is not well executed, upon the lessee being

<sup>(</sup>q) Co. Lit. 148 b.

<sup>(</sup>r) Co. Lit. 148 b. See Baynton v. Morgan, L. R. 21 Q. B. D. 101. (s) Hunt v. Cope, 1 Cowp. 242; 1 Wms. Saund. 204 (2), Salmon v.

<sup>(</sup>t) Williams v. Hayward, 28 L. J. Q. B. 374.

<sup>(</sup>u) 3 Co. 22 b, Walker's Case; Smith v. Malings, Cro. Jac. 160; Stevenson v. Lumbard, 2 East, 575; Mayor of Swansea v. Thomas, L. R. 10 Q. B. D. 48; 52 L. J. Q. B.

<sup>(</sup>v) Co. Lit. 148 b.

ejected from the latter, the rent is apportionable (w). A defect of title is immaterial to the claim for rent, unless and until the lessee is actually evicted and expelled from possession under it (x). But if there be a charge or incumbrance upon the land, as a ground rent, rent charge or mortgage, which the lessee is compelled to pay to the benefit of the lessor, he may treat the payment as payment of so much rent to the lessor (y). If there be both adverse title and possession of part of the land at the time of the lease, so that the lessee cannot enter upon that part, the lease, as to that part, is wholly void, and the reservation of rent is not apportionable (z). But if the lessee enters upon and possesses the rest of the demised land, he may be liable to pay the value of the use and occupation of the part possessed (a).

A rent charge granted out of land is not apportioned by Eviction of eviction of the grantor from part of the land; "for against rent charge. his own grant he shall not take advantage of the weakness of his own estate in part." So, "if a man grant a rent charge out of two acres, and after the grantee recovereth one of the acres against the grantor by a title paramount, the whole rent shall issue out of the other acre" (b). And "if the land out of which the rent charge is granted be recovered by an older title and thereby the rent charge is avoided, yet the grantee shall have a writ of annuity" (c).

Apportionment or partition of rent may be effected by Apportionpartition of the entire amount; or by partition of the time ment of rent. during which it is accruing due. As to the amount, "there are two modes of apportioning rent, one by granting the reversion of part of the land out of which the rent

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(w) Doe v. Meyler, 2 M. & S.
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<sup>(</sup>x) Boodle v. Campbell, 7 M. & G.

<sup>(</sup>y) Ib.; Johnson v. Jones, 9 A. & E. 809.

<sup>(</sup>z) Neale v. Mackenzie, 1 M. & W. 747; Gardiner v. Williamson, 2 B. & Ad. 336.

<sup>(</sup>a) Tomlinson v. Day, 2 B. & B. 680; 5 Moore, C. P. 558.

<sup>(</sup>b) Co. Lit. 148 b.

<sup>(</sup>c) Co. Lit. 148 a; ante, p. 392.

issues; the other by granting part of the rent to one person and part to another "(c).

By partition of the rent.

Rent, whether rent service or rent charge, may be divided in amount, and assigned in several parts, by deed or will, whilst the reversion and the tenement charged remain entire; and the assignee of a part of the rent may sue or distrain for the amount of his part separately. attornment or consent of the tenant of the land to such partition of the rent is not necessary; for though he may thereby be subjected to several actions or distresses, it would be only by reason of his own default in not paying the rent (d).

By partition of the reversion.

Rent service is apportioned by law upon a partition of the reversion to which the rent is incident. If the partition is made in undivided shares, the rent is apportioned in amount according to the number of shares; and each partitioner may distrain in his own right upon all the demised premises, but only for the amount of his own share (e). If the partition is made by granting the reversions of several parts of the demised premises separately, the rent is apportioned according to the value of the several parts; and each reversioner may distrain upon his own part only for the rent apportioned to that part. In such case the tenant is not bound by an apportionment without his consent, and if he disputes the amount claimed, it must be settled in the legal proceedings taken by the several reversioners for their respective shares of the rent (f). Accordingly, "if a man make a lease for years reserving a rent, if he grant away part of the reversion, the rent shall be apportioned by the common law, and albeit the grantee of part demand or claim more in his

<sup>(</sup>c) Abbott, C. J., Bliss v. Collins, 5 B. & Ald. 882.

<sup>(</sup>d) Ards v. Watkin, Cro. Eliz. 637, 651; Colborne v. Wright, 2 Lev. 239; Rivis v. Watson, 5 M. & W. 255.

<sup>(</sup>e) Philpott v. Dobinson, 6 Bing.

<sup>(</sup>f) Bliss v. Collins, 5 B. & Ald. 876; Roberts v. Snell, 1 M. & G. 577.

action of debt or avowry than is due, yet shall he recover so much as the jury shall find upon a just apportionment to be due" (g). So, "If a man makes a lease of three acres each of equal yearly value, rendering 3s. rent, and the lessor grants the reversion of one acre, and the tenant attorns, the grantee shall have 12d, rent, for although it was one lease, one reversion, and one rent, yet that was incident to the reversion which was severable, and the rent shall wait upon the reversion and upon every part of it" (h). The lessor who grants away the reversion in part of the demised premises remains entitled to the value apportioned to the reversion of the part retained; and he may recover that amount upon the covenant by the lessee to pay the rent reserved (i). And the grantee of the reversion in part may also recover upon the covenant the amount of rent apportioned to his part (j). lease may in terms reserve several rents for several parts of the demised premises, which are then distinct rents, charged only upon the several parts respectively, and incident respectively to the reversions of the several parts; but where a lease expressly reserved an entire rent, and afterwards apportioned that rent to several parts, it was construed as charging the rent upon the whole, with a mere declaration of the values of the several parts which made up the whole rent (k).

A partition of the reversion in parts of the land may be Partition by caused by act of law. Where lands of different tenures. act of law. as freehold and leasehold, or freehold and copyhold, are demised together at an entire rent, and upon the death of the lessor they pass by descent to different persons, the rent is apportioned to each according to the value of the lands; and the covenants and conditions are also ap-

<sup>(</sup>g) 2 Co. Inst. 504. See Ever v. Moyle, Cro. Eliz. 771; West v. Lassells, Cro. Eliz. 851; Collins v. Harding, 13 Co. 57.
(h) 8 Co. 79 b, Wild's Case.
(i) Co. Lit. 148 a; Mayor of

Swansea v. Thomas, L. R. 10 Q. B. D. 48; 52 L. J. Q. B. 340.
(j) Twynam v. Pickard, 2 B. & Ald. 105.

<sup>(</sup>k) Knight's Case, 5 Co. 54 b; Winter's Case, Dyer, 308 b.

portioned to the respective lands (1). So, upon a joint lease by tenants in common and death of one, the reversion is divided, and the rent is apportioned with the divided reversion (m). Similarly, where a house and furniture were let at an entire rent, the interest in the house and the furniture becoming severed, it was held that the rent was apportionable between the several interests (n).

Partition by tenant.

Statute of Quia Emptores.

Rent is not apportionable by any act or disposition of the tenant alone, without the concurrence or consent of the owner of the rent; and though the tenant aliens part of the land, the remedies for the entire rent remain unaffected (o). An exception was made by the Statute Quia Emptores, 18 Edw. I. c. 1. Before the statute, upon an alienation of part of a tenement held in fee, the lord might distrain upon the land aliened or upon the land reserved for the whole of his services, as if the whole tenement remained in the possession of his tenant. But the statute, after declaring that "it shall be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them," provided that "if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the service, for so much as ought to pertain to the same chief lord for that parcel according to the quantity of the land or tenement sold; and the same part of the service shall cease to be taken by the chief lord by the hands of the feoffor" (q). Services which are entire and indivisible, as the delivery of a horse, or a hawk, or the like, are not apportionable under the statute, but each feoffee holds by the entire of such services to be rendered in full as at common law (r).

<sup>(</sup>l) Co. Lit. 215 a; Huntley v. Roper, 1 And. 21; per cur. Eucer v. Moyle, Cro. Eliz. 772.

(m) Beer v. Beer, 12 C. B. 60; 21 L. J. C. P. 124.

<sup>(</sup>n) Salmon v. Matthews, 8 M. &

W. 827.

<sup>(</sup>o) Broom v. Hore, Cro. Eliz. 633; 3 Co. 24 a, Walker's Case; Christie v. Barker, 53 L. J. Q. B.

<sup>(</sup>q) 2 Inst. 503; per cur. Holloway v. Berkeley, 6 B. & C. 10.
(r) Bruerton's Case, 6 Co. 1; Talbot's Case, 8 Co. 104 b; ante, p. 409.

Conditions of re-entry for non-payment of rent and Apportionother conditions annexed to estates, were considered at ment of conditions. common law as entire and indivisible, and not apportionable by any act of the lessor to several parts of the rent or to several parts of the demised premises; so that neither a grantee of the reversion in part, nor the lessor reserving the reversion in part, could take advantage of the condition. "As if the lease be of three acres, reserving a rent, upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed; for that it is entire and against common right." But by act of law a condition may be apportioned; as if a lease is made of two acres of different tenure, which upon the death of the lessor pass by descent to different persons, each of them may enter for the condition broken (s).

The law in this respect was altered by 22 & 23 Vict. Under the c. 35, s. 3, which made conditions of re-entry for non-pay- Conveyancing Act. ment of rent apportionable with the rent and the reversion. And now it is provided more generally by "The Conveyancing and Law of Property Act, 1881," 44 & 45 Vict. c. 41, s. 12 (1), "notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease."-(2.) "This section applies only to leases made after the commencement of this Act."

<sup>(</sup>s) Co. Lit. 215 a; 5 Co. 55 b, Knight's Case. See ante, p. 413.

Apportionment of rent to time, at common law.

At common law rent payable at fixed periods was not apportionable in respect of time. If the rent ceased or the title failed from any cause in the interval during which a payment was accruing due, no part of the rent could be claimed for the time elapsed since the last period of payment. It was held that "if tenant for life makes a lease for years rendering rent at the feast of Easter, and the lessee occupies for three-quarters of the year, and in the last quarter before the feast of Easter the tenant for life dies, here shall be no apportionment of the rent for threequarters of the year, because no rent was due till the feast of Easter, and no apportionment shall be in respect of time" (t).

Apportionment in equity.

Equity followed the rule of law, and under the same circumstances allowed no claim against the tenant for an apportionment of rent (u). But if the tenant in fact continued in occupation after the legal determination of the tenancy and paid a sum of money as and for rent, though not strictly due as such, the money so paid was considered in equity as apportionable between the several persons under whom the occupation was held; and the reversioner having received the whole amount was held bound to account for a proportionate part to the former owner or his representative (x). A similar equity was held to arise between the representative of a tenant in tail deceased without issue and the remainderman, upon a lease made by the former which determined with his death (y).

Apportion ment by terms of limitation.

A rent or other periodical payment may be reserved or charged to accrue due from day to day, and is then apportioned in respect of time by the express terms of the reservation or charge; and in some cases it is construed to be apportionable in order to carry out the intention and purpose of the charge. Such is the general rule of con-

<sup>(</sup>t) 10 Co. 128 a, Clun's case; Ex parte Smyth, 1 Swanst. 337. (u) Jenner v. Morgan, 1 P. Wms. 392; Hay v. Palmer, 2 Ib. 502. (x) Hawkins v. Kelly, 8 Ves. 308;

Knight v. Boughton, 12 Beav. 312. (y) Paget v. Gee, Ambl. 198; 3 Swanst. 694; Vernon v. Vernon, 2 Bro. C. C. 659; Kevill v. Davies, 15 Sim. 466.

struction with charges for the maintenance of children; though made payable at fixed times, they are considered as accruing due from day to day, because intended for the daily maintenance of the children (z). The same rule of construction applies to a charge for the maintenance of a wife living apart from her husband (a).—Interest upon Interest. debts payable at fixed periods is considered to accrue due from day to day; as a mortgage debt, though it be charged upon land and made distrainable as rent by an attornment clause (b). So, the interest upon a bond, conditioned for half-yearly payments, is apportionable in relieving against the penalty (c).—At common law annuities in general were Annuities. not apportionable, including government annuities, and dividends of the public funds (d).

Statutes have been passed to amend the strict rule of the Apportioncommon law and to make rents and other periodical pay-ment by statute. ments generally apportionable. The first of these statutes, 11 Geo. II. c. 19, s. 15, applied to the case of rent reserved at fixed periods in leases made by tenants for life, which determined by the death of the lessor; and it enabled his executor or administrator to recover from the lessee "a proportion of such rent, according to the time such tenant for life lived of the last year, or other time, in which the said rent was growing due." By an Amendment Act, Between 4 & 5 Will. IV. c. 22, s. 1, this enactment was extended lessee. to leases made by tenants pur autre vie, and to all leases · which determine on the death of the person making the same, although not strictly tenant for life.

These enactments enlarged the liability of the tenant Between sucapportionately to the duration of his lease, but they did not of rent.

Atk: 260. See post, p. 419.

<sup>(</sup>z) Hay v. Palmer, 2 P. Wms. 502; Reynish v. Martin, 3 Atk. 330; Sheppard v. Wilson, 4 Hare,

<sup>(</sup>a) Howell v. Hanforth, 2 W. Bl.

<sup>(</sup>b) Pearly v. Smith, 3 Atk. 260; Edwards v Warwick, 2 P. Wms. 176.

<sup>(</sup>c) Per cur. Howell v. Hanforth, (a) Sherrard v. Haryorth, supra; Banner v. Lowe, 13 Ves. 135.
(b) Sherrard v. Sherrard, 3 Atk.
502; Wilson v. Harman, 2 Ves.
sen. 672; Rashleigh v. Master, 3
Bro. C. C. 101; Pearly v. Smith, 3

touch the case of a change of ownership of the rent during the currency of a lease and pending the accrual of rent; as in the case of the death of a tenant in fee simple, when the whole rent accruing due to his estate passed to his heir or devisee without any apportionment up to the time of his death; or upon the death of a tenant for life of settled land, when the whole accruing rents went to the remainderman (e).—In order to amend the law in this respect it was further enacted by 4 & 5 Will. IV. c. 22, s. 2, "That all rents service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power, and all rents charge and other rents, annuities, and all other payments of every description made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this Act, shall be apportioned so that on the death of any person interested in any such rents or other payments, or on the determination by any other means of the interest of such person, he or his executors, administrators, or assigns shall be entitled to a proportion of such rents and other payments according to the time which shall have elapsed from the last period of payment, and shall have the same remedies as for recovering such entire rents and payments; but so that persons liable to pay rents reserved by any lease shall not be resorted to for such apportioned parts, but the entire rents shall be received and recovered by the persons who if this Act had not passed would have been entitled to such entire rents, and such portions shall be recoverable from such persons by the parties entitled to the same in any action or suit, in law or in equity."

Apportionment Act, 1870. "The Apportionment Act, 1870," 33 & 34 Vict. c. 35, has now provided for the apportionment of rents and other periodical payments in more general and comprehensive terms, superseding for the most part the former Acts.

<sup>(</sup>e) Norris v. Harrison, 2 Madd. 268.

After reciting that "rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have been passed," it proceeds to enact as follows: - Sect. 2. "From and after the passing of this Rents to Act all rents, annuities, dividends, and other periodical accrue from day to day. payments in the nature of income, (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Sect. 3. "The apportioned part of any such rent, Time of payannuity, dividend, or other payment shall be payable or ment. recoverable, in the case of a continuing rent, annuity or other such payment, when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent, annuity, or other such payment determined by re-entry. death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before."

Sect. 4. "All persons and their respective heirs, execu- Remedies. tors, administrators and assigns, and also the executors, administrators and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable, as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands, or other hereditaments of any tenure. and the same lands or other hereditaments, shall not be resorted to for any such apportioned part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if

the rent had not been apportionable under this Act or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity."

Interpretation of terms.

Sect. 5. "In the construction of this Act, the word "rents" includes rent service, rent charge, and rent seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe. The word "annuities" includes salaries and pensions. The word "dividends" includes all payments made by the name of dividend, bonus or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made" (f). Sect. 6, excepts from the Act "any annual sums made payable in policies of assurance."—Sect. 7, excepts "any case in which it is or shall be expressly stipulated that no apportionment shall take place "(g).

Exceptions.

The intention of this Act is said to be to assimilate rent to a debt for money lent of which the interest accrues due from day to day; and the effect of the Act is that rent, which by sect. 2 is to be considered as accruing from day to day, becomes rent in arrear for the purpose of vesting it in the owner for the time being, although, by sect. 4, it is not in arrear for the purpose of claiming it from the tenant of the land before the time fixed for payment by his lease. Accordingly rents are now apportioned between

Apportionment between

> (f) See Jones v. Ogle, L. R. 8 Ch. 192; 41 L. J. C. 633; Cox's Trusts, L. R. 9 C. D. 159; 47 L. J. C. 735; 23 L. J. C. 283.

the real and personal estate of a deceased owner; so that real and perthe heir or the devisee (whether by specific or residuary sonal estate. devise) takes the accruing rent only from the day of the death, the personal representative taking the apportioned part up to that date; unless a contrary intention be expressed by will (h). So upon a specific legacy of stock in a public company the dividends were held to be apportioned between the estate of the testator and the specific legatee (i). The Act applies in this respect to wills made before the Act, so far as they come into operation after the Act (j).

So where land is settled, or is let under the powers of a Tenant for settlement, the rents and other periodical payments issuing mainderman. out of the land are apportioned between the estate of a deceased tenant for life and the remainderman, or between other successive estates upon a change of ownership. In the case of renewable leaseholds, the fines for renewal are of the nature of rent payable in advance for the whole period of renewal and therefore presumptively belong to the tenant for life or other present owner, like rent accrued due and other casual profits; but it is generally provided in settlements that fines shall be treated as capital to be invested for the uses of the settled land (k). -The Act also applies upon the assignment of a lease, so Between that the assignor remains liable to the lessor for an appor-assignor and assignee of tioned part of the accruing rent up to the day of assign- lease. ment (1). And upon the liquidation of a company who are lessees of premises, of which the liquidator takes to the lease for the benefit of the company, the rent is apportioned: the lessor must prove for the amount due at the commencement of the liquidation, and can distrain in full

<sup>(</sup>h) Capron v. Capron, L. R. 17 Eq. 288; 43 L. J. C. 677; Hasluck v. Pedley, L. R. 19 Eq. 271; 44 L. J. C. 143; Constable v. Constable, L. R. 11 C. D. 681; 48 L. J. C. 621; Brownrigg v. Pike, L. R. 7 P. D. 61; 51 L. J. P. 29. (i) Pollock v. Pollock, L. R. 18

Eq. 329; 44 L. J. C. 168. (j) Constable v. Constable, supra; Lawrence v. Lawrence, L. R. 26 C. D. 795; 53 L. J. C. 982. (k) Brigstocke v. Brigstocke, L. R. 8 C. D. 357; 47 L. J. C. 817. (l) Swansea Bank v. Thomas, L. R. 4 Ex. 94; 48 L. J. Ex. 344.

only for subsequent rent (m). But where a testator directed his executor to release his tenant from all rent due and owing to him at the time of his decease, the bequest was construed to apply only to the rent accrued due at the preceding quarter-day, and not also to an apportioned part of the rent accruing due at his death (n).

## Section III. Remedies for Rent,—(1) Distress.

§ 1. Distress.—§ 2. Things distrainable.—§ 3. Wrongful distress.

## § 1. Distress.

Remedies for rent in arrear—distress.

Conditions of right of distress—rent certain in amount—rent payable at certain time—distress for services.

Rent in arrear—limitation of arrears—under express trusts—of rent in bankruptcy—of rent of agricultural holdings.

Distress during tenancy—possession after determination of lease—by custom of the country—holding over after demand of possession after giving notice to quit.

Distress upon demised tenement—upon servient tenement—upon common.

Distress off the demised tenement—distress of goods fraudulently removed.

Distress by bailiff—bailiffs to be certificated.

Distress to be taken in daytime—breaking into tenement—breaking inner doors—taking possession of goods.

Impounding distress—impounding on the premises—public and private pounds—feeding impounded cattle—liability of distrainer for state of pound.

Statutory power of selling distress—sale upon the premises—construction of statutes, as to notice of distress—time of sale—appraisement—price—charges—sale of distress optional—tender of rent before sale.

Remedies for rent.

The ordinary remedies at common law for non-payment of rent are distress; action of debt or of covenant, if there

(m) Re South Kensington Cooperative Stores, L. R. 17 C. D. 161; 50 L. J. C. 447; Re Oak Pits Colliery, L. R. 21 C. D. 322; 51 L. J.

C. 768.
(n) Re Lucas, 55 L. J. C. 101, Fry, J., dissentiente.

be a covenant to pay; and ejectment, if there be a condition of re-entry for non-payment.

Distress is the remedy by act of the party himself, Distress. without the intervention of legal process; he may enter upon the land out of which the rent issues and seize any moveable goods found thereon, and detain them as a pledge for payment of rent in arrear (a).—Distress is regulated as to the conditions of exercising the right, and as to the time, place and mode of conducting it by rules of the common law, amended from time to time by statutes, chiefly in giving a modified power to sell the distress and take satisfaction for the rent out of the proceeds of the sale. A distress given by grant or agreement may restrict or alter the ordinary rules of distress by express terms of stipulation; but merely affirmative words will not be construed to do so, if they are not inconsistent with the ordinary rules (b).

The principal conditions of exercising the right of dis- Conditions tress are that there is a rent certain in amount, and pay- of right of distress. able at a certain time; that rent is in arrear and unpaid within the limits of time prescribed by law; and that the tenancy upon which the rent was reserved is continuing.

or which can be reduced to a certainty (c). Where a lease in amount. was made of tithes together with a tithe barn, reserving a certain rent, but the demise being by an instrument not under seal was void as to the tithes, it was held that there was no right of distress; because the whole rent was not recoverable, and no certain part was reserved for the barn apart from the tithes (d). In such a case if the demise were valid the rent would issue out of the whole property and would be distrainable out of the land, though no dis-

tress could be made upon the tithe (e).—A rent is not con-

A distress can only be made for rent which is certain, Rent, certain

<sup>(</sup>a) Ante, p. 373. (b) Co. Lit. 205 a; Giles v. Spencer, 3 C. B. N. S. 244; Re Swale Brick Co., 52 L. J. C. 638.

<sup>(</sup>c) Co. Lit. 96a, 142a. (d) Gardiner v. Williamson, 2 B. & Ad. 336.

<sup>(</sup>e) Ib.; Doubitofte v. Curteene,

sidered to be uncertain for the purpose of a distress which can be made certain by computation or by measurement, or which is subject to occasional reductions or additions, or which may depend upon a contingency; provided that it may be reduced to a certainty at the time of distraining: as a rent assessed upon the quantity of hay or corn or other produce grown upon the land; or an additional rent to be paid if the land be ploughed or used in a particular manner; or a rent assessed upon the number of bricks made upon the land, or upon the quantity of minerals taken out of it (f). The demise of part of a factory with steam power for working machines at a stated sum per annum, subject to deduction for hindrances caused by defective supply of power proportionate to the time, was held to give a sufficiently certain rent to be recoverable by distress (g). So with a lease of a mill for a term of years at the annual payment of a fixed sum for every loom which the lessee should work, and stipulating for a minimum number to be paid for in advance (h). with a rent payable by a member of a building society. under a mortgage to the society, assessed at the amount of an instalment of the debt together with the subscription, interest, and fines payable as a member; the rent in such cases is mere matter of calculation, and it is no objection that it is fluctuating in amount (i).

Rent payable at certain time.

The rent must also be certain as to the time of payment. It may be reserved yearly, or every two or more years; or half-yearly, quarterly, monthly, or daily, or at any certain periods of time (j). A reservation upon a lease at will, "paying after the rate of eighteen pounds a year," was held void, for the uncertainty of the time of

Cro. Jac. 452; 2 Wms. Saund. 304; Dean of Windsor v. Gover; Salmon v. Matthews, 8 M. & W. 827; ante, p. 382.
(f) Daniel v. Gracie, 6 Q. B.

<sup>45.</sup> 

<sup>(</sup>g) Selby v. Greaves, L. R. 3

C. P. 594; 37 L. J. C. P. 251. (h) Walsh v. Lonsdale, L. R. 21

C. D. 9.

(i) Ex parte Voisey, Re Knight,

<sup>(</sup>i) Ex parte Voisey, Re Knight, L. R. 21 C. D. 442; 52 L. J. C. 121.

<sup>(</sup>j) Co. Lit. 47 a.

payment (k). A reservation of rent "at Michaelmas or within a month after" was held to give the lessee the election to pay it at any time within the period limited, so that it was not due and distrainable until the end of the month (1). Rent may be reserved, payable in advance, and is then distrainable on the first day of the term (m). Rent may be reserved payable on certain days, and distrainable if demanded; a demand at any time after it is due being a condition of the distress (n). It may be reserved payable on certain days, and in advance if demanded; and then it could not be distrained for as due in advance without demand (o). Under an express covenant rent may be payable on a day after the expiration of the term (p).

A distress may be taken for services, if they are suffi- Distress for ciently certain or can be reduced to a certainty. "As a services. man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough albeit the lord hath sometime a greater number and sometime a lesser number there, yet being referred to the manor which is certain the lord may distrain "(q). tenure of land by the service of cleaning the parish church, or of ringing the church bell at stated times, was held to constitute a service for which a distress might be made (r). "There appears to be a difficulty in the case where a distress is taken for a service unperformed at a past time, as to how long it is to be kept as a pledge; it may be taken that if the service was performed on the next occasion, the distress would be at an end "(s).

A distress can only be made for rent in arrear; and, there-Rent in fore, not until after the day upon which it becomes due, the arrear.

(k) Parker v. Harris, 4 Mod. 79, Dolben, J., dissentiente.

C. D. 9, cited above.

(n) Co. Lit. 202 a. (o) Williams v. Holmes, 8 Ex. 861; 22 L. J. Ex. 283.

(p) Hopkins v. Helmore, supra.
(q) Co. Lit. 96 a.

(r) Doe v. Benham, 7 Q. B. 976; Doe v. Billett, 7 Q. B. 983.

(s) Per cur. Doe v. Benham, supra.

<sup>(</sup>l) Pilkington v. Dalton, Cro. Eliz. 575; Blunden's Case, Cro. Eliz. 565; Clun's Case, 10 Co. 127 b.

<sup>(</sup>m) Buckley v. Taylor, 2 T. R. 600; Holland v. Palser, 2 Stark. 161; Hopkins v. Helmore, 8 A. & E. 463; Walsh v. Lonsdale, L. R. 21

tenant having until midnight of that day for payment. At common law if the lessor died on the rent-day before midnight the accruing rent together with the right of distress passed with the reversion or title, and not as arrears to his executor; but it is now apportionable by statute (s).—The time for distraining may be postponed by express terms of the lease; but a clause of distress in merely affirmative terms, that if the rent be behind for so many days the lessor may distrain, does not take away the common law right of distraining immediately the rent is due (t).

Limitation of arrears.

By the 3 & 4 Will. IV. c. 27, s. 42, "No arrears of rent, or of interest in respect of any sum of money charged upon, or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent." By the 3 & 4 Will. IV. c. 42, s. 3, the personal remedy by action of debt or covenant for arrears of rent or interest of money charged upon land is expressly limited to twenty years; and it is held not to be impliedly limited to six years by the former statute, which is construed as applying only to remedies against the land by distress or otherwise (u).

Express trusts of rent.

By the "Real Property Limitation Act, 1874," 37 & 38 Vict. c. 57, s. 10, "After the commencement of this Act no action suit or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and

<sup>(</sup>s) Duppa v. Mayo, 1 Wms. Saund. 286 b; ante, p. 416. (t) Co. Lit. 205 a; per cur. in Giles v. Spencer, 3 C. B. N. S. 253; Re Swale Brick Co., 52 L. J. C. 638.

<sup>(</sup>u) Paget v. Foley, 2 Bing. N. C. 690; Strachan v. Thomas, 12 A. & E. 536; Humfrey v. Gery, 7 C. B. 567; Hunter v. Nockolds, 1 M. & G. 640.

secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such express trust." By the above statute 3 & 4 Will. IV. c. 27, s. 25, express trusts of land or rent were protected from limitation by time, until they had been conveyed to a purchaser for a valuable consideration; which protection is now abolished (v).

By the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, Rent in s. 42, a distress levied upon the goods of a bankrupt after the commencement of the bankruptcy is available only for one year's rent accrued due prior to the date of the order of adjudication; and the person to whom the rent may be due must prove under the bankruptcy for the surplus of arrears (w).

bankruptcy.

By the Agricultural Holdings Act, 1883, 46 & 47 Viet. Rent of c. 61, s. 44, "After the commencement of this Act it shall agricultural holdings. not be lawful for any landlord entitled to the rent of any holding to which this Act applies to distrain for rent, which became due in respect of such holding more than one year before the making of such distress.—Provided that where it appears that according to the ordinary course of dealing between the landlord and tenant of a holding the payment of the rent of such holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then for the purpose of this section the rent of such holding shall be deemed to have become due at the expiration of such quarter or half year as aforesaid, as the case may be, and not at the date at which it legally became due" (x).

<sup>(</sup>v) See Hughes v. Coles, L. R. 27 C. D. 231; 53 L. J. C. 1047. (x) Re Bew, Ex parte Bull, L. R. 18 Q. B. D. 642; 56 L. J. Q. B. 270. (w) See post, p. 458.

Distress during tenancy. At common law distress could only be made during the continuance of the tenancy upon which the rent was reserved; and a distress made after the tenancy had ceased was wrongful, whether the tenancy expired by lapse of time or was determined by forfeiture or by eviction (x). Hence if a lessor, having an option of forfeiture, distrains for rent, he thereby presumptively recognizes and affirms the continuation of the tenancy, without which the distress would be wrongful, and cannot afterwards claim the forfeiture; but if he has first claimed the forfeiture by bringing ejectment or otherwise, he cannot afterwards distrain for rent (y). Hence also no distress could be made at common law for rent falling due the last day of the tenancy, because the rent is not in arrear till midnight and the term then ends (z).

Possession after determination of lease.

In the case of a tenant keeping possession after the determination of his lease, it is enacted by 8 Ann. c. 14, s. 6, that "it shall be lawful for any person or persons having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined." By sect. 7, "provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears become due." By 3 & 4 Will. IV. c. 42, ss. 37, 38, the same extension is given to a distress by the executors or administrators of a lessor for the arrearages of rent due to such lessor in his lifetime.—The Statute of Anne applies to continued pos-

<sup>(</sup>x) Bridges v. Smyth, 5 Bing. 410; Hopcraft v. Keys, 9 Bing. 613; Burne v. Richardson, 4 Taunt. 720; Grimwood v. Moss, L. R. 7 C. P. 360; 41 L. J. C. P. 239.

<sup>(</sup>y) Co. Lit. 211 b; 3 Co. 64 b, Pennant's Case; Doe v. Darby, 8 Taunt. 538; Grimwood v. Moss, supra.

<sup>(</sup>z) Co. Lit. 47 b.

session of the tenant, whether permissive or wrongful, and whether of the whole or of a part only of the demised premises (a). It applies to the possession of the executors or administrators of the tenant after his death (b). It seems that it does not apply to possession after determination of the tenancy by a forfeiture (c). Distress under this statute justifies taking goods fraudulently removed, under the power given by the statute 11 Geo. II. (d).

Where by the custom of the country an outgoing tenant By custom of has the possession for a certain time after the expiration of his lease for the purpose of working the away-going crops, the landlord retains the right to distrain during the continued possession of the tenant, independently of the Statute of Anne and of the six months limit of that statute (e). But the landlord cannot distrain crops of the outgoing tenant for rent due from the incoming tenant. for he can only let the land subject to the rights of the former (f). Where the tenant upon the cesser of his landlord's estate has the right to hold over until the end of the then current year of his tenancy, instead of his claims to emblements, under the statute 14 & 15 Vict. c. 25, s. 1, the succeeding landlord becomes entitled to his fair proportion of the rent, and may recover it by distress(g).

By the statute 4 Geo. II. c. 28, s. 1, "In case any tenant Holding over for any term of life, lives or years, shall wilfully hold over after demand of possession. any lands, tenements or hereditaments after the determination of such term, and after demand made and notice in writing given for delivering the possession thereof by his landlord or lessor, such person so holding over shall, for

<sup>(</sup>a) Nuttal v. Staunton, 4 B. & C.

<sup>(</sup>b) Taylerson v. Peters, 7 A. & E. 110; Braithwaite v. Cooksey, 1 H.

<sup>(</sup>c) Willes, J., Grimwood v. Moss, L. R. 7 C. P. 365; 41 L. J. C. P. 239.

<sup>(</sup>d) Post, p. 433; see Gray v. Stait, 52 L. J. Q. B. 412.

<sup>(</sup>e) Beavan v. Delahay, 1 H. Bl. 8; see Boraston v. Green, 16 East, 81. (f) See Eaton v. Southby, Willes, 136.

<sup>(</sup>g) Haines v. Welch, L. R. 4 C. P. 91; 38 L. J. C. P. 118; ante, p. 47.

and during the time he shall so hold over, pay to the person so kept out of possession at the rate of double the yearly value of the lands, tenements and hereditaments so detained, for so long time as the same are detained, to be recovered by action of debt; against the recovering of which said penalty there shall be no relief in equity." This statute is a penal statute and is construed strictly; a weekly tenancy is not a term of years within the meaning of the statute; nor, it seems, is a quarterly tenancy (g). Wilful holding over is construed as excluding holding over by mistake or under a boná fide claim (h). There is no power of distress under this Act, because there is no certainty of the double value (i).

Holding over after giving notice to quit.

By the statute 11 Geo. II. c. 19, s. 18, "In case any tenant shall give notice of his intention to quit the premises by him holden at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant shall from thenceforward pay to the landlord or lessor double the rent or sum which he should otherwise have paid, to be levied, sued for and recovered at the same time and in the same manner, as the single rent, before the giving such notice could be levied, sued for or recovered; and such double rent or sum shall continue to be paid during all the time such tenant shall continue in possession as aforesaid." The double rent is recoverable by distress; the notice is not required to be in writing, but it must be a valid notice determining the tenancy (k).

Distress must be made upon the demised tenement. A distress by common law can be made only upon the land or tenement out of which the rent issues. By the Statute of Marlebridge, 52 Hen. III. c. 15, it was declared, in confirmation of the common law, that "it shall

<sup>(</sup>g) Lloyd v. Rosbee, 2 Camp. 453; Wilkinson v. Hall, 3 Bing. N. C. 508.

<sup>(</sup>h) Swinfen v. Bacon, 6 H. & N. 846; 30 L. J. Ex. 368.

<sup>(</sup>i) Wilmot, J., Timmins v. Row-lison, 1 W. Bl. 535.

<sup>(</sup>k) Timmins v. Rowlison, 1 W. Bl. 533; Johnstone v. Hudlestone, 4 B. & C. 922.

be lawful for no man from henceforth, for any manner of cause, to take distresses out of his fee, nor in the king's highway, nor in the common street, but only to the king or his officers." It is a prerogative right of the Crown to distrain upon any lands or tenements of the debtor, of whomsoever they may be holden; provided they are in his personal possession (l).—The highway is privileged from distress, though within the fee or tenements demised (m). A distress for toll can be made only upon the highway and is an implied exception from the statute (n). Under a bill of sale goods may be seized upon a highway, and the provision of the Bills of Sale Act, 1882, s. 13, that the goods seized "shall remain on the premises where they were seized" for five days before sale does not apply (o).—A distress may be made on any part of the demised premises for the whole rent; and notwithstanding the premises have been underlet by the tenant in parts to different sub-tenants (p). But if there be separate demises of two tenements at distinct rents to the same tenant, there must be separate distresses; distress cannot be made on the one tenement for the rent of the other or of both (q).—A distress cannot be made Servient upon land which is merely servient to the demised tenement. tenement in respect of appurtenant rights of easement or profit; as where a wharf was let with the easement of mooring barges over the adjacent river frontage, it was held that the barges could not be distrained in the river. though they were fastened to the wharf (r). So, where mines are leased apart from the surface of the land, and the plant and machinery used for the purpose of working

<sup>(1)</sup> Co. Lit. 161 a; 2 Co. Inst. 131; see Duke of Leeds v. Powell, 1 Ves. sen. 172; Att.-Gen. v. Co-ventry, 1 P. Wms. 306. (m) Co. Lit. 160 b.

<sup>(</sup>n) Smith v. Shepherd, Cro. Eliz. 71Ò.

<sup>(</sup>o) O'Neil v. City Finance Co., L. R. 17 Q. B. D. 234.

<sup>141; 6</sup> Bing. 150.

<sup>(</sup>p) See Saffery v. Elgood, 1 A. & E. 194; and see 4 Geo. II. c. 28,

<sup>(</sup>q) Rogers v. Birkmire, 2 Strange, 1040; Bedford v. Sutton Coldfield, 3 C. B. N. S. 449; 27 L. J. C. P. 105; Phillips v. Whitsed, 2 E. & E. 804; 29 L. J. Q. B. 164.
(r) Bussard v. Capel, 8 B. & C.

common.

the mines are placed upon the surface, they cannot be Distress upon distrained for the rent of the mines (s).—But by the statute 11 Geo. II. c. 19, s. 8, a lessor or landlord may "take and seize, as a distress for arrears of rent, any cattle or stock of their respective tenant or tenants, feeding or depasturing upon any common appendant, or appurtenant, or any ways belonging to all or any part of the premises demised or holden."

Distress off the demised tenement.

At common law goods could not be followed and distrained off the tenement, though the tenant purposely removed them to prevent distress. Exception was made where cattle were driven off to prevent a distress in view of the distrainor; he might then freshly follow and distrain the cattle off the land, and even upon the highway (t). But cattle cannot be distrained damage feasant, if driven off the premises before actual seizure (t).

Goods fraudulently removed.

By the statute 11 Geo. II. c. 19, s. 1, "In case any tenant or tenants, lessee or lessees, for life or lives, term of vears, at will, sufferance or otherwise, of any messuages, lands, tenements or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises his or their goods or chattels to prevent the landlord or lessor from distraining the same for arrears of rent so reserved, due, or made payable, it shall be lawful for every landlord or lessor, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels wherever the same shall be found, as a distress for the said arrears of rent; and the same to sell and otherwise to dispose of in such manner as if the goods had been actually distrained by such landlord in and upon such

<sup>(</sup>s) See Re Oak Pits Colliery Co., L. R. 21 C. D. 328; 51 L. J. C. 770. (t) Co. Lit. 161 a; 2 Co. Inst.

premises for such arrears of rent."—Sect. 2, excepts "such goods and chattels which shall be sold bonâ fide and for a valuable consideration to any person not privy to such fraud."—Sects. 3—6, impose a penalty upon any tenant so fraudulently removing goods and any person assisting in the removal, and provide for recovery of the penalty. And sect. 7 gives a special power, upon the conditions therein stated, to break open and enter into any house or other place to take and seize such goods (u).

proved as a matter of fact, as by evidence that no sufficient of statute. distress was left and other circumstances; a mere removal of goods whilst rent is in arrear is not sufficient to raise the presumption of fraud (v). And a removal of goods with intention to avoid distress is not necessarily fraudulent, as there may be a bonâ fide question of the right to distrain (w).—The statute applies only to goods removed whilst subject to distress, and makes them distrainable as if they had not been removed. Goods cannot be taken which were removed before the rent was due (x); or which were removed after the right to distrain had ceased by the termination of the tenancy (y), or by the landlord having conveyed away his reversion (z).—The statute is expressly restricted to the goods of the tenant or lessee, and does not apply to goods of another person; which the tenant

may lawfully remove to prevent their being distrained by the superior landlord (a). A creditor of the tenant may take goods in satisfaction of his debt, with notice of an intended distress, and lawfully remove the goods to prevent their

The fraudulent intention to prevent distress must be Construction

being distrained (b).

<sup>(</sup>u) See post, p. 436.

<sup>(</sup>v) Parry v. Duncan, 7 Bing. 243. (w) John v. Jenkins, 1 C. & M.

<sup>221.
(</sup>x) Northfield v. Nightingale, 1
C. & M. 230 n.; Rand v. Vaughan,
1 Bing. N. C. 767; Gray v. Stait,
L. R. 11 Q. B. D. 668; 52 L. J.

Q. B. 412.

<sup>(</sup>y) Gray v. Stait, supra; and see ante, p. 428.

<sup>(</sup>z) Ashmore v. Hardy, 7 C. & P. 501.

<sup>(</sup>a) Thornton v. Adams, 5 M. & S. 38.

<sup>(</sup>b) Bach v. Meats, 5 M. & S. 200.

As to the manner of making a distress for rent, it may be made by the party himself, or by his bailiff under a sufficient warrant or authority to distrain; it must be taken in the daytime; and it must be taken without breaking into the demised premises.

Distress by bailiff.

Bailiffs to be certificated.

A distress may be made in person, or by a bailiff or agent duly authorized in that behalf. The authority is not required by law to be in writing; but it is usual to sign a formal authority in writing, commonly called a "warrant of distress." A distress made by a bailiff without authority previously given, may be supported by subsequent ratification of the person on whose behalf it was made (z). The employer is responsible for acts of his bailiff which are within the scope of the employment; but he does not impliedly indemnify the bailiff beyond warranting to him the right to distrain (a).—By the Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, s. 7, "From and after the commencement of this Act (31 Oct. 1888) no person shall act as bailiff to levy any distress for rent, unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge; and such certificate may be general or apply to a particular distress or distresses, and may be granted at any time after the passing of this Act, in such manner as may be prescribed by rules under this Act." And "if any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying, and any person who has authorized him so to levy, shall be deemed to have committed a trespass "(b).

which enacted to nearly the same effect as to agricultural holdings. As to the latter Act see Re Sanders, Ex parte Sergeant, 54 L. J. Q. B. 331; Coode v. Jones, L. R. 17 Q. B. D. 714; 55 L. J. Q. B. 475.

<sup>(</sup>z) 1 Saund. 347, n. (4), Potter v. North; Maclean v. Dunn, 4 Bing.

<sup>(</sup>a) Bullen on Distress, 130.
(b) The above Act, s. 9, repeals the Agricultural Holdings Act, 1853, 46 & 47 Vict. c. 52, s. 52,

A distress must be made in the daytime, that is, between Distress must sunrise and sunset; and it lies upon the distrainor to show be made in daytime. that he is acting legally in this respect. A distress made in the night is a trespass, for which the tenant of the land may recover damages and the value of goods taken (c). Where a landlord after sunset took measures forcibly to prevent the removal of goods, in order that he might distrain them the next day, which the owner of the goods forbore to resist, it was held that the latter could not claim for a wrongful conversion and deprivation of the goods, because they remained in his possession and control until the distress was legally made (d).

It is not lawful at common law to break into a house, Breaking into either through the outer door or otherwise, for the purpose house. of entering to distrain (e). It is lawful to open an outer door for that purpose in the usual way, by turning a key or latch; provided the door is fastened merely to keep it closed, and not to prevent people entering (f). An entry to distrain may be made through an open window; and a window partly opened may be opened wider for the purpose of entering (g); but it is not lawful for that purpose to open a closed window, though not fastened (h). The same rule applies to buildings of all kinds, as stables, barns and outhouses; also to enclosures of land. It is not lawful to break open outer doors, windows, gates or fences to take a distress (i). Where a landlord and tenant occupied adjacent tenements, being tenants in common of the partition between them, it was held no trespass for the

B., dissentiente.

<sup>(</sup>c) Tutton v. Darke, 5 H. & N. 647; 29 L. J. Ex. 271; Blackburn, J., Attack v. Bramwell, 3 B. & S. 530; 32 L. J. Q. B. 150. "But for damage feasant one may distrain in the night, otherwise it may be the beasts will be gone before he can take them." Co. Lit. 142 a.

(d) England v. Cowley, L. R. 8

Ex. 126; 42 L. J. Ex. 80; Martin,

<sup>(</sup>e) Semayne's case, 5 Co. 92 a; 1 Smith's L. C.

<sup>(</sup>f) Ryan v. Shilcock, 7 Ex. 72; 21 L. J. Ex. 55.

<sup>(</sup>g) Crabtree v. Robinson, L. R. 15 Q. B. D. 312; 54 L. J. Q. B. 544. (h) Nash v. Lucas, L. R. 2 Q. B. 590; 8 B. & S. 531.

<sup>(</sup>i) Co. Lit. 161 a; Brown v. Glen, 16 Q. B. 254; 20 L. J. Q. B.

landlord to remove the partition, and that thus entering without trespass he might lawfully distrain (i).—In all cases of unlawful entry the distrainor is a trespasser ab initio; the distress is void; the goods taken cannot be dealt with as a distress, or applied in discharge of the rent; and the tenant may recover the goods or their full value (j). By the statute 11 Geo. II. c. 19, s. 7, a special power is given to break into any house, close or place, to take goods fraudulently removed from the demised premises to prevent distress (k). And it seems that a special power to break into the demised tenement may be acquired by express stipulation with the tenant (1).—After an entry has been lawfully made, inner doors and fastenings may be broken open, if necessary, in order to find goods distrainable (m). If a distrainor lawfully in possession of a distress is forcibly ejected, or if in his temporary absence, not having abandoned the distress, the house or premises are closed against him, he may lawfully break in to recover possession (n).

Breaking inner doors.

Taking possession of goods distrained.

Distress is made by the distrainor or his bailiff taking possession, actual or constructive, of the goods, upon the premises out of which the rent issues. Entering into a house and taking possession of some specific goods as a distress in the name of all the goods in the house is a good distress of all (o). And where the landlord prevented the removal of goods from the demised premises under a claim of distraining them there, it was held a sufficient taking possession (p). Where a bailiff entered upon the premises and gave a written notice that he had distrained the goods specified in the notice, it was held to be a sufficient taking

<sup>(</sup>i) Gould v. Bradstock, 4 Taunt.
562.
(j) Attack v. Bramwell, 3 B. & S. 520; 32 L. J. Q. B. 146
(λ) Ante, p. 432.
(l) See Lumley v. Simmons, 55
L. J. C. 759.
(m) Brown v. Daun, Bull. N. P. 81.

<sup>(</sup>n) Eagleton v. Gutteridge, 11 M. & W. 465; Bannister v. Hyde, 29 L. J. Q. B. 141.

<sup>(</sup>o) Holt, C. J., in Dod v. Monger, 6 Mod. 215.

 <sup>(</sup>p) Wood v. Nunn, 5 Bing. 10;
 Cramer v. Mott, L. R. 5 Q. B. 357;
 L. J. Q. B. 172.

possession upon which to charge the landlord with an excessive distress (q). Where a landlord sent a bailiff to distrain for a sum of rent and costs of distress, which was paid by the tenant to prevent the distress, it was held that the landlord was estopped from denying that he had actually distrained, in an action for an excessive distress (r).

At common law the landlord having taken a distress for Removal and rent was required to remove the goods off the demised impounding of distress. premises; and if he kept them there beyond a reasonable time for removal, he became a trespasser. He was further required to put them in a pound, that is, some fit and proper place for keeping the goods taken; but he was not allowed to impound them on the premises (s). He was not restricted to place or distance, and might cause much trouble to the tenant by distraining his cattle and impounding them in several and distant places; for remedy of which hardship the Statute of Marlebridge, 52 Hen. III. c. 4, provided, that "none from henceforth shall cause any distress that he hath taken to be driven out of the county where it was taken." The statute 1 & 2 P. & M. c. 12, s. 1, further provided, "that no distress of cattle shall be driven out of the hundred where such distress is taken, except it be to a pound overt within the same shire not above three miles distant from the place where the said distress is taken; and that no cattle or other goods distrained or taken by way of distress for any manner of cause at one time shall be impounded in several places, whereby the owner shall be constrained to sue several replevies for the delivery of the said distress." The statute imposes a penalty, but does not render the distress void (t).

Now by the statute 11 Geo. II. c. 19, s. 10, it is made Impounding

<sup>(</sup>q) Swann v. Falmouth, 8 B. & C. (r) Hutchins v. Scott, 2 M. & W.

<sup>(</sup>s) Griffin v. Scott, 2 Ld. Raym. 1426.

<sup>(</sup>t) Gimbart v. Pelah, Stra. 1272; Woodcroft v. Thompson, 3 Lev. 48.

on the premises. lawful "for any person lawfully taking any distress for any kind of rent to impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place, or in such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress." Since this enactment it has become the general practice to impound goods distrained by securing them upon the premises; or, with the assent of the tenant, by leaving them as they stand upon the premises without any removal (v). The distrainor may lock up the goods in part of the premises, if necessary for their security; but he cannot lock up the whole premises to the exclusion of the tenant without his consent; if he cannot impound them safely upon the premises, he must impound them elsewhere (w). No separate charge for impounding can be made, where the distress is impounded on the premises (x).

Public and private pound.

At common law pounds were distinguished as public and private. It was customary in manors to provide a public pound for common use, and to appoint a pound keeper. The duty of the pound keeper was to receive into the pound all distresses brought to him, chiefly cattle, but without any responsibility on his part for the taking or detaining; goods impounded being considered in custody of the law, whence they can be released only by the legal process of replevin, unless by consent of the distrainor (y). This public or manor pound was called a pound overt, that is, open of access, to which the owner of cattle impounded might come to find them and to feed them, and in which they remained at his risk. The private pound was that provided by the distrainor himself, to which the owner of

<sup>(</sup>v) Washborn v. Black, 11 East, 405; Thomas v. Harries, 1 M. & G.

<sup>(</sup>w) Etherton v. Popplewell, 1 East, 139; Woods v. Durrant, 16 M. & W. 149; Smith v. Ashforth, 29 L. J. Ex. 259.

<sup>(</sup>x) Child v. Chamberlain, 5 B. & Ad. 1049.

<sup>(</sup>y) Badkin v. Powell, 2 Cowp. 476; Hawkins, J., Green v. Duckett, L. R. 11 Q. B. D. 280; 52 L. J. Q. B. 435.

the distress had no access; in which, therefore, the distrainor kept cattle impounded at his own risk and cost (z).

In order to secure the feeding of cattle impounded it is Feeding now provided by the statute 5 & 6 Will. IV. c. 59, that impounded cattle. "every person who shall impound any cattle or animal in any common pound, open pound, or close pound, or in any inclosed place is required to find, provide, and supply such cattle and animal daily with good and sufficient food," under a penalty of five shillings a day. It is further provided that he may recover from the owner of such cattle or animal, not exceeding double the value of the food supplied, by proceeding before a justice of the peace; or if he think fit, he may, after notice, sell the cattle or animal, and apply the proceeds of the sale in discharge of the value of the food, rendering the overplus, if any, to the owner.

The distrainor is in all cases personally responsible that Liability of the pound used by him, whether public or private, is a fit distrainor for state of and proper place for keeping the distress; and he is liable pound. for loss of or damage to the distress caused by insufficiency or defects of the pound, as for the escape of cattle, or for putting cattle into a pound too small to hold them properly, or in such a bad condition that they become depreciated in value. But he would not be responsible if the distress escaped, died, or was stolen, without any default or negligence on his part; and he might then take another distress (a).

At common law a distress was kept impounded as a Sale of pledge until restored by replevin, or redeemed by payment: distress. but it afforded no direct means of obtaining satisfaction. The statute 2 W. & M. sess. 1, c. 5, s. 2, first gave the means of obtaining satisfaction by sale of the goods distrained. After a preamble stating that "whereas the most ordinary and ready way for recovery of arrears of

<sup>(</sup>z) Co. Lit. 47 b; Holt, C. J., Vaspor v. Edwards, 12 Mod. 664. 662; Wilder v. Speer, 8 A. & E. 547; Bignell v. Clark, 5 H. & N. 485; 29 L. J. Ex. 257. (a) Vaspor v. Edwards, 12 Mod.

rent is by distress, yet such distresses not being to be sold, but only detained as pledges for enforcing the payment of such rent, the persons distraining have little benefit thereby," for remedy thereof it proceeds to enact "that where any goods shall be distrained for rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof, with the cause of such taking, left at the chief mansionhouse or other most notorious place on the premises charged with the rent distrained for, replevy the same, in such case the person distraining shall and may (in manner therein provided) cause the goods and chattels so distrained to be appraised by two sworn appraisers; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained and of the charges of such distress, appraisement and sale; leaving the overplus, if any, for the owner's use." The statute 4 Geo. II. c. 28, s. 5, gives "the like remedy by distress and by impounding and selling the same, in cases of rent secks, rents of assize, and chief rents as in case of rent reserved upon lease "(b).

Sale upon the premises.

The statute 11 Geo. II. c. 19, s. 10, applies to "any distress for any kind of rent," and after providing that it shall be lawful to impound the distress upon the premises, as already noticed, gives the power "to appraise, sell and dispose of the same upon the premises, in like manner and under the like directions and restraints, as any person taking a distress for rent may now do off the premises," by virtue of the above statutes (c).

Construction of statutes as to notice of distress. It is a statutory condition of a sale of the distress, that notice of the distress, with the cause, be given to the tenant in the manner provided in the Act; and it is usual to deliver with it an inventory of the goods taken. The

notice is not conclusive as to the things taken, in support of an action for a wrongful distress; and if some of them be not distrainable, the actual taking may be limited to such as are (d).—The five days allowed for replevin are Time of reckoned from the time of notice left, from which time there must be five clear days or intervals of twenty four hours each, before the goods can be lawfully appraised and sold (e). By the Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, s. 6, "the period of five days shall be extended to a period of not more than fifteen days, if the tenant make a request in writing in that behalf" (f). A reasonable time, according to the circumstances, may be taken after the five days for the purpose of appraisement and sale; and a further time may be taken with the consent of the tenant (q).— Appraisement of the goods before sale by two sworn Appraiseappraisers (to be sworn by the sheriff, undersheriff, or ment. constable of the hundred, parish or place), was also a statutory condition; but which the tenant might dispense with (h). This condition is now repealed by the Law of Distress Amendment Act, 1888, s. 5, "except in cases where the tenant or owner of the goods and chattels by writing requires such appraisement to be made; and the landlord or other person levying a distress may, except as aforesaid, sell the goods and chattels distrained without causing them to be previously appraised "(i). The two appraisers must be reasonably competent, but they need not be professional (k). They must not be interested in the distress, and therefore the distrainor himself cannot act as

<sup>(</sup>d) Beck v. Denbigh, 29 L. J. C. P.

<sup>(</sup>e) Wallace v. King, 1 H. Bl. 13; Harper v. Taswell, 6 C. & P. 166.

<sup>(</sup>f) This Act repeals s. 57 of the Agricultural Holdings Act, 1883, which enacted to the same effect for agricultural holdings only.

<sup>(</sup>g) Pitt v. Shaw, 4 B. & Ald.

<sup>208;</sup> Fisher v. Algar, 2 C. & P.

<sup>(</sup>h) Biggins v. Goode, 2 C. & J. 364; Bishop v. Bryant, 6 C. & P.

<sup>(</sup>i) This Act repeals s. 50 of the Agricultural Holdings Act, to the same effect.

<sup>(</sup>k) Roden v. Eyton, 6 C. B. 429.

Price.

one of them (i).—The sale must also be "for the best price that can be gotten." The sworn appraisement is presumptively the best price, until the contrary be shown; and the goods may be sold to the sworn appraisers. It is not necessary to have a sale by public auction; nor is the actual sale, whether by auction or not, a conclusive test of the best price (j). By the Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, s. 5, a sale by public auction may be had at the request in writing and at the cost of the tenant (k). The goods must be sold free of all covenants or restrictions that may affect the price; if the tenant has covenanted to consume hay and straw upon the premises, the landlord having distrained such goods cannot sell them subject to the like condition, but must sell them absolutely (1). The landlord cannot take the goods at the appraised value in discharge of so much rent, instead of selling them for the best price that can be gotten in satisfaction of the rent; unless by consent of the tenant or of the owner of the goods(m).—Goods distrained may be sold "towards satisfaction of the rent and of the charges of the distress, appraisement and sale, leaving the overplus, if any, for the owner's use." Where the rent does not exceed twenty pounds, the charges are fixed by 57 Geo. III. c. 93 (sched.); if the rent exceeds that amount, the charges must be reasonable, and the amount may be questioned in an action for not leaving the overplus according to the statute (n). By the same statute, sect. 6, the broker or person distraining is required to give a signed copy of his

Charges of distress.

<sup>(</sup>i) Lyon v. Weldon, 2 Bing. 334. (j) Walter v. Rumball, 1 L. Raym. 53; 4 Mod. 390; Keightley v. Birch, 3 Camp. 524; Smith v. Ashforth, 29 L. J. Ex. 259.

<sup>(</sup>k) The above Act repealed s. 50 of the Agricultural Holdings Act, 1883, which enacted to the same effect for agricultural holdings only. See ante, p. 441.

<sup>(</sup>l) Hawkins v. Walrond, L. R. 1 C. P. D. 280; 45 L. J. C. P. 772.

C. P. D. 280; 45 L. J. C. P. 772. See Roden v. Eyton, 6 C. B. 427. (m) King v. England, 4 B. & S. 782; 33 L. J. Q. B. 145. (v) Lyon v. Tomkies, 1 M. & W. 603. By the Distress Amendment Act, supra, s. 8, the Lord Chain-cellor may make rules for regu-lating the fees, charges and expenses in distresses.

charges, and of all costs of the distress to the person on whose goods the distress is levied; but a landlord not personally interfering in the distress is not liable for the neglect of his broker to deliver a copy (o).

The sale of a distress under the above statutes is optional; Sale optional. a landlord having distrained for rent may detain the distress as a pledge at common law instead of selling it (p). But he can bring no action for the rent so long as he detains the distress, though it may be insufficient in value (q). He cannot detain the distress on the premises beyond the five days allowed for replevin by the statute; for the right of impounding upon the premises under 11 Geo. II. c. 19, is only given for the convenience of selling, and continues only so long as may be necessary for that purpose; and if the distress is not removed within a reasonable time after the five days the distrainor is answerable as a trespasser, unless the tenant consents (r). sale of corn and hay, distrainable and saleable by statute 2 W. & M. c. 5, s. 3; and of growing crops, distrainable and saleable by 11 Geo. II. c. 19, s. 8, is made compulsory; such goods being of a perishable kind (s).

The tenant or owner of the goods may prevent the sale Tender before not only by replevin, as expressly provided in the statute, but also "upon an equitable construction of the statute" by a tender of the amount of rent and costs within the five days, and a sale after such tender would be wrongful (t). At common law a tender after impounding was too late to avoid the distress; but replevin may be made at any time during the continuance of the distress (u).

<sup>(</sup>o) Hart v. Leach, 1 M. & W. 560. (p) Bayley, J., Lear v. Edmonds, 1 B. & Ald. 159; Hudd v. Ravenor,

<sup>2</sup> B. & B. 662. (q) Lehain v. Philpott, L. R. 10 Ex. 242; 44 L. J. Ex. 225; post, р. 471.

<sup>(</sup>r) Pitt v. Shew, 4 B. & Ald. 208;

Winterbourne v. Morgan, 11 East, 395.

<sup>(</sup>s) Per cur. Piggott v. Birtles, 1 M. & W. 448, post, p. 446. (t) Johnson v. Upham, 2 E. & E. 250; 28 L. J. Q. B. 252, overruling Ellis v. Taylor, 8 M. & W. 415. (u) Post, p. 462; Jacob v. King, 5 Taunt. 451.

## § 2. Things Distrainable.

Things distrainable-fixtures.

Animals.

Perishable goods-corn and hay-growing crops.

Things in personal use.

Implements of trade—beasts of plough—condition of privilege.

Goods of stranger distrainable—exceptions in favour of trade—goods delivered for working—tools and implements of trade—agricultural implements.

Goods delivered to agent for selling—for safe keeping—for carrying—conveyances used for privileged goods.

Cattle taken in to feed.

Protection of the goods of lodgers.

Goods in custody of the law—goods taken in execution—liability of sheriff after notice of rent due.

Goods in possession of receiver—goods in bankruptcy—goods of company under winding up.

Things subject to distress. By the common law all moveable goods and chattels which are the subjects of property, may be taken as a distress for rent; except when, under certain circumstances, they become privileged (a). But a power to distrain given by deed or agreement may be extended or restricted, as to the things distrainable, beyond the rules of the common law (b).

Fixtures.

Fixtures, in the strict meaning of the term, that is things annexed, actually or constructively, to the land or to buildings upon the land, being considered in law as part of the land itself, are not distrainable (c); as the rails and sleepers of a railway (d). Reasons given for this rule are; that

<sup>(</sup>a) Co. Lit. 47 a. (b) Re Swale Briek Co., 52 L. J. C. 638; Horsford v. Webster, 1 C. M. & R. 696.

<sup>(</sup>c) Ante, p. 120; Co. Lit. 47 b; Niblet v. Smith, 4 T. R. 504; Dalton v. Whittem, 3 Q. B. 961. (d) Turner v. Cameron, L. R. 5 Q. B. 306; 39 L. J. Q. B. 125.

fixtures cannot be severed without damage to the land or building; that they cannot be restored in statu quo; that no part of the land itself can be taken in distress, but only the inducta or illata upon it (e). Nor can "tenants' fixtures" be distrained and removed by the landlord, though removeable by the tenant during his tenancy (f).—Keys, windows, and the like moveable appurtenances of a house are parcel of the freehold by construction of law, and therefore not distrainable. Also title deeds and other documents and evidences of title follow the land to which they relate, and are not distrainable; so with the deed chests or boxes exclusively appropriated to keeping them (q).

Animals feræ naturæ, not being the subject of property, Animals. cannot be taken as a distress; but animals reduced into possession, as deer in a park, birds in a cage, dogs and other tame animals may be taken (h). Animals kept for use as horses, sheep and cattle may be taken, with the exception or privilege that those used for working the land must be postponed to other available goods (i).

Things of a perishable nature, which cannot be detained Perishable in pledge for the necessary time without loss or damage, nor restored in the same condition as when taken, are privileged from distress; as dead meat, milk, fruit, vege-· tables and the like. Nor is the common law on this point affected by the statutory power of sale given by 2 W. & M. c. 5 (j).—It seems that money is exempt from distress unless enclosed in a bag or box, because of the risk of

<sup>(</sup>e) See Simpson v. Hartopp, Willes, 512; 1 Smith's L. C. 180; Gilbert on Distress, 34, cited per cur. Hellawell v. Eastwood, 6 Ex. 311; Darby v. Harris, 1 Q. B. 895. (f) Darby v. Harris, 1 Q. B. 895; Hellawell v. Eastwood, supra.

<sup>(</sup>g) Ante, pp. 111, 125; per cur. Hellawell v. Eastwood, 6 Ex. 311. (h) Co. Lit. 47 a; Davies v.

Powell, Willes, 46; as to property

in dogs, see Binstead v. Buck, 2 W. Bl. 1117. Sect. 40 of 2 & 3 Vict. c. 71, which gives power to metropolitan police magistrates to order delivery of "goods" unlawfully detained, is held to include dogs as · goods. The Queen v. Slade, 57 L. J. M. 120.

<sup>(</sup>i) Post, p. 449. (j) Morley v. Pincombe, 2 Ex. 101.

loss, and the difficulty of identifying and restoring it in replevin. Gold and silver may be distrained, and are to be taken at least at their intrinsic value (k).

Corn and hav.

Corn, straw, hay and the like were not distrainable at common law, because of the risk of damage in removal; but carts loaded with corn might be distrained, for they might be removed and restored with safety (l). statute 2 W. & M. sess. 1, c. 5, s. 3, after reciting that such things could not be distrained for rent, enacted that "it shall be lawful for any person having rent arrear and due upon any demise, lease, or contract, to seize and secure any sheaves or shocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land charged with the rent, and to lock up or detain the same in the place where the same shall be found, for and in the nature of a distress, until the same shall be replevied; and in default of replevying the same within the time aforesaid, to sell the same after such appraisement thereof to be made "(m). This statutory power applies to rent charge as well as to rent reserved, to which the sale given by sect. 2 is confined (n). The statutory sale of these things is compulsory; that of things distrainable at common law is optional (o).

Growing crops.

Growing crops of corn, grass or other product were not distrainable at common law, because annexed to the soil and not available for any purpose until properly cut and gathered. By the statute 11 Geo. II. c. 19, s. 8, it was enacted that "it shall be lawful for every lessor to take and seize all sorts of corn and grass, hops, roots, fruits, pulse or other product whatever, which shall be growing

<sup>(</sup>k) 2 Bac. Abr. 109; Moir v. Munday, cited 1 Burr. 590. Money, bank notes and securities for money were made seizable under a writ of fieri facias, by the statute, 1 & 2 Vict. c. 110, s. 12, and under an execution out of the County Court

by 9 & 10 Vict. c. 95, s. 96. (l) Co. Lit. 47 a.

<sup>(</sup>m) See sect. 2, ante, p. 439. (n) Johnson v. Faulkner, 2 Q. B. 925; ante, p. 440.

<sup>(</sup>o) Per cur. Piggott v. Birtles, 1 M. & W. 448; ante, p. 443.

on any part of the estates demised or holden, as a distress for arrears of rent; and the same to cut, gather, make, cure, carry, and lay up, when ripe, in the barns or other proper place on the premises; and in convenient time to appraise, sell, or otherwise dispose of the same towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress, appraisement and sale, in the same manner as other goods may be seized, distrained and disposed of; and the appraisement thereof to be taken when cut, gathered, cured, and made, and not before." —This statute applies in terms only to lessors and landlords. and therefore to rent service only; the grantee of a rent charge cannot distrain growing crops, unless the power be expressly given him by the terms of his grant. Where a rent charge was granted, with power to distrain for arrears and to dispose of the distress "in the same manner as distresses for rents reserved upon leases for years," it was held upon the construction of the deed, that the reference to rents applied only to the mode of disposing of the distress, and did not extend the power to growing crops (p). —A sale of the crops in a growing state is not authorized by the statute; it is wholly void and has no effect upon the property; but it does not affect the legality of the distress, and the tenant has no cause of action except for the damage, if any, caused by the irregularity of the sale (q). A sheriff seizing growing crops in execution must sell them standing, he cannot recover expense incurred in cutting and making them (r). The words "other product" include all things of a like kind to those mentioned, but not trees and shrubs in a nursery garden, which remain exempt from distress (s). The crops of an outgoing tenant, which he retains the right of cutting and carrying, cannot be distrained upon for rent of the incoming tenant; for the tenant's right to take the growing crops

<sup>(</sup>p) Miller v. Green, 2 C. & J. 142; 8 Bing. 92; see Johnson v. Faulkner, 2 Q. B. 925.

<sup>(</sup>q) Owen v. Legh, 3 B. & Ald. 470; Proudlove v. Twemlow, 1 C. &

M. 326; Rogers v. Parker, 18 C. B. 112; 25 L. J. C. P. 220.
(r) Re Woodham, L. R. 20 Q. B. D. 40; 57 L. J. Q. B. 46.

<sup>(</sup>s) Clark v. Gaskarth, 8 Taunt. 431.

is paramount to that of the landlord (t).—The growing crops thus made distrainable by the statute become subject to replevin as goods and chattels (u). The statutory sale of a distress of growing crops is compulsory (r).

Goods in personal use.

Goods in the actual use of a person are privileged from distress; as a horse which a man is riding; or an axe with which he is cutting wood, or a loom with which he is weaving; because the taking of things out of personal possession tends to a breach of the peace (w). So, wearing apparel in actual use on the person is not distrainable (x). By the Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, s. 4, exemption from distress for rent is extended to "any goods or chattels of the tenant or his family which would be protected from seizure in execution under s. 96 of the County Courts Act, 1846," (re-enacted by the County Courts Act, 1888, s. 147,) namely, "the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of five pounds."—A horse and cart cannot be distrained as damage feasant whilst being led or driven by a person (y): but a dog accompanying a person, and not otherwise in personal possession and use, may be distrained damage feasant (z).

Implements of trade.

A privilege from distress attaches to some things only under the condition that other sufficient distress can be found upon the premises. By the common law "no man shall be distrained by the utensils or instruments of his trade or profession, as the axe of a carpenter, or the books of a scholar, while other goods may be distrained" (a). If such things are also in actual use at the

<sup>(</sup>t) Eaton v. Southby, Willes, 131.
(u) Glover v. Coles, 1 Bing. 6.
(v) Per cur. Piggott v. Birtles, 1

M. & W. 448; ante, p. 446. (w) Co. Lit. 47 a; Simpson v. Hartopp, Willes, 512; 1 Smith's

<sup>(</sup>x) Bisset v. Caldwell, Peake, 36; Baynes v. Smith, 1 Esp. 206; see

Sunbolf v. Alford, 3 M. & W. 248. (y) Storey v. Robinson. 6 T. R. 138; Field v. Adames, 12 A. & E.

<sup>(</sup>z) Bunch v. Kennington, 1 Q. B. 679.

<sup>(</sup>a) Co. Lit. 47 a; Simpson v. Hartopp, Willes, 512; 1 Smith's L. C.; Gorton v. Falkner, 4 T. R.

time, they become absolutely privileged, as above stated (b). -Also by the statute 28 Ed. I. c. 12, which is declara- Beasts of the tory of the common law, "no man shall be distrained by plough. his beasts that work his land, nor by his sheep, so long as there can be found other chattels sufficient for the demand" (c).

Such things are primâ facie distrainable, and it lies upon Condition of the tenant to prove the condition of privilege by evidence privilege. that sufficient other chattels could be found (d). Growing crops, distrainable by statute, are not available as other chattels for this purpose; because they cannot be sold until they are cut and carried (e). The sufficiency of the other chattels is to be estimated at the time of taking the distress; and not by the subsequent sale (f). If there are other distrainable goods of sufficient value on the premises at the time, the distress is wholly wrongful and may be treated as a trespass by the owner of the goods (g). Such things, when rightfully taken, have no further privilege of being postponed in the sale (h).

As a general rule, the ownership of distrainable goods Goods of found upon the demised premises is immaterial; they are distrainable. equally liable to distress, whether they belong to the tenant or to a stranger. And the statutory power to sell goods distrained enables the landlord to sell the goods of a stranger, and to apply the proceeds in discharge of the rent (i). The statutory power to follow and distrain off the premises goods removed to prevent distress applies

565; Harvey v. Pocock, 11 M. & W.

(e) Piggott v. Birtles, 1 M. & W.

441. See ante, p. 447.

(f) Jenner v. Iolland, 2 Chitty, 167; 6 Price, 5. (g) Nargatt v. Nias, 1 E. & E. 439; 28 L. J. Q. B. 143.

(h) Jenner v. Wolland, supra. (i) Cramer v. Mott, L. R. 5 Q. B. 360; 39 L. J. Q. B. 172; per Blackburn, J., Lyons v. Elliott, L. R. 1 Q. B. D. 213.

<sup>(</sup>b) Ante, p. 448. (c) Co. Lit. 47 a; 2 Co. Inst. 132; Jenner v. Yolland, 6 Price, 5; Keen v. Priest, 4 H. & N. 236; 28 L. J. Ex. 157. The privilege does not apply to a distress for rates, which is in the partner of rates, which is in the nature of an execution for a statutory debt, and not a mere pledge to be detained till payment. Hutchins v. Chambers, 1 Burr. 588.

<sup>(</sup>d) Anon., Dyer, 312.

only to goods of the tenant or lessee (j).—The above rule applies in distraining for all rents properly so called, whether rent service or rent charge (k); and in distraining for annuities charged upon the land (1); but it cannot be applied to a power given by covenant or agreement to seize goods as a distress or security for any debt or payment, not being a rent issuing out of land (m). distress under an attornment clause in a mortgage deed is a distress for rent, attended with all the incidents of such distress, whether common law or statutory, and the goods of a stranger may be taken under it (n).—A landlord may by special agreement renounce the right of distraining the goods of a stranger (o). And a mortgagee in possession is not liable to account to his mortgagor for loss of rent caused by his neglecting to distrain goods which do not belong to the tenant of the premises (p). Goods of the tenant seized by the grantee of a bill of sale are distrainable so long as they remain upon the premises; and the grantee is required by the Bills of Sale Act, 1882, ss. 7, 13, to keep the goods upon the premises for five clear days after the seizure to enable the grantor to apply to a judge; but he is not bound to keep them there to enable the landlord to distrain; and he may remove them at any time with the consent of the grantor for whose benefit only the five days are allowed (q).

Exceptions in favour of trade.

Exceptions to the above rule are made by law under a general principle in favour of trade. The goods of a stranger are privileged from distress, which have been "delivered to a person exercising a trade, to be carried,

<sup>(</sup>j) Thornton v. Adams, 5 M. & S. 38; ante, p. 434.

<sup>(</sup>k) Saffery v. Elgood, 1 A. & E. 191; Johnson v. Faulkner, 2 Q. B. 925.

<sup>(</sup>l) See Muspratt v. Gregory, 1 M. & W. 633:

 <sup>(</sup>m) Freeman v. Edwards, 2 Ex.
 732; see Re Sankey Brook Coal Co.,
 L. R. 12 Eq. 472; 41 L. J. C. 119.

<sup>(</sup>n) Kearsley v. Philips, L. R. 11 Q. B. D. 621; 52 L. J. Q. B. 581; see ante. p. 378.

<sup>(</sup>a) Fowkes v. Joyce, 2 Vern. 129; Horsford v. Webster, 1 C. M. & R. 696; see Giles v. Spencer, 3 C. B. N. S. 253.

<sup>(</sup>p) Cocks v. Gray, 1 Giff. 77; 26 L. J. C. 607.

<sup>(</sup>q) Lane v. Tyler, 56 L. J. Q. B. 461.

wrought or manufactured in the way of his trade" (r). The privilege is restricted to the premises of the trader or workman. If he is employed in his business upon the premises of the owner of the goods, or to deal with them on other premises than his own, there is, in general, no privilege against distress for the rent of those premises (s). But goods delivered for carriage are exceptional in being privileged during the carriage in all places (t).

The following are examples of this privilege: A horse Goods desent to a smith's shop to be shod; cloth or garments livered for working. delivered to a tailor to be worked up or repaired; corn delivered to a miller to be ground (u); materials delivered to a weaver to be woven (v); beasts sent to a butcher to be slaughtered (w); a ship delivered to a shipbuilder for repair in his dockyard (x).—There is no privilege for goods Goods made made by a workman or trader for delivery to a buyer or to order. employer, although made to order, and at the cost of the buyer; as in the case of a ship built to order in the shipbuilder's yard, and paid for by instalments as completed. There must be a delivery of the goods or materials by the owner to the workman or trader, actual or constructive, in order to create the privilege (y).

Tools and implements of trade delivered to a workman Tools and for use in his business are not privileged, although de- implements of trade. livered for the special purpose of working particular materials: as where looms were lent to weavers for use at their own homes, and material provided for weaving, it was held that though the material was within the privilege,

<sup>(</sup>r) Willes, C. J., Simpson v. Hartopp, Willes, 515; 1 Smith L. C. 8th ed. 450; Clarke v. Millvall Dock Co., L. R. 17 Q. B. D. 494; 55 L. J. Q. B. 378.

(s) Lyons v. Elliott, L. R. 1 Q. B. D. 214; 45 L. J. Q. B. 159; Croster v. Tomkinson, Barnes, 472; 2 Kenyon, 439.

<sup>2</sup> Kenyon, 439.

<sup>(</sup>t) Post, p. 453. (u) Co. Lit. 47 a; Simpson v. Hartopp, Willes, 512; 1 Smith,

<sup>(</sup>v) Rede v. Burley, Cro. Eliz. 549; Wood v. Clarke, 1 C. & J. 484; Gibson v. Iveson, 3 Q. B. 39.
(v) Brown v. Shevill, 2 A. & E.

<sup>(</sup>x) Clarke v. Millwall Dock Co., 55 L. J. Q. B. 378; L. R. 17 Q. B. D. 494.

<sup>(</sup>y) Clarke v. Millwall Dock Co.,

the weaving looms were not (z). So the casks of a brewer delivered to a publican to be used by him for keeping the beer until it is consumed, according to the practice of the trade, are not privileged (a). Tools and implements of trade under such circumstances are privileged conditionally in right of the workman or trader, if other sufficient distress can be found; and they are privileged absolutely while in actual use (b).

Agricultural implements.

A special privilege was given to agricultural implements and machinery by the Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, s. 45, providing that, "Agricultural or other machinery which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant under a bonâ fide agreement with him for the hire or use thereof in the conduct of his business; and live stock of all kinds which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes, shall not be distrained for rent in arrear."—A special exception is also made by statute of meters and fittings for gas let for hire by gas companies; which are exempted from distress for rent by the Gasworks Clauses Act, 1847, 10 & 11 Vict. c. 15, s. 14 (c).

Live stock for breeding.

Gas fittings.

Goods delivered to agent for selling. Goods delivered to an agent for the purpose of selling in the way of his business are privileged; as goods consigned for sale to a factor or to a commission agent (d); and goods delivered to an auctioneer to sell on his own premises, or on premises occupied by him for that purpose (e). But if an auctioneer is employed to sell goods upon the premises of another person, there is no privilege

<sup>(</sup>z) Gorton v. Fulkner, 4 T. R. 565; Wood v. Clarke, 1 C. & J. 484. (a) Toule v. Jackson, 7 M. & W. 450.

<sup>(</sup>b) Ib., ante, p. 448. (c) Gas Light and Coke Co. v. Hardy, L. R. 17 Q. B. D. 619; 56 L. J. Q. B. 168.

<sup>(</sup>d) Gilman v. Elton, 3 B. & B. 75; Findon v. McLaren, 6 Q. B. 891.

<sup>(</sup>e) Adams v. Grane, 1 C. & M. 380; Brown v. Arundell, 10 C. B. 54; Williams v. Holmes, 8 Ex. 861; 22 L. J. Ex. 283.

against a distress of the goods for the rent of those premises, whether they are the goods of the tenant himself, or of another person who has sent them there for sale (f). -Goods exposed for sale in a public market or fair are privileged from distress (q).

Goods delivered to a person for safe keeping in the Goods way of his trade are privileged; as goods deposited with delivered for safe keeping. a warehouseman or wharfinger (h); goods deposited at a furniture warehouse (i); goods pledged to a pawnbroker (j). The goods of a guest at an inn are privileged whilst they remain upon the premises of the innkeeper; but if the innkeeper places them upon the premises of others, the goods are there liable to distraint (k). Horses and carriages delivered to a livery stable keeper to stand at livery have been held not to be privileged; because, it was said, the purpose of delivering the goods upon the premises was to remain there at the will of the owner, and the work done upon them was merely incidental to that purpose (1).

Goods delivered to a carrier are privileged; also goods Goods carried on their way to a fair or market. These cases delivered for carrying. are exceptional in this respect, that the goods are privileged during the carriage, on whatever premises they may be lodged (m).—The privilege of the goods in the above cases Conveyances extends to all things accessory to the delivery of the goods. goods. "Thus the horse or carriage conveying goods is so privileged; and so also the basket or packages in which they

for privileged

(g) Co. Lit. 47 a. (h) Thompson v. Mashiter, 1 Bing.

(i) Miles v. Furber, L. R. 8 Q. B. 77; 42 L. J. Q. B. 41.

<sup>(</sup>f) Lyons v. Elliott, L. R. 1 Q. B. D. 210; 45 L. J. Q. B. 159.

<sup>(</sup>j) Swire v. Leach, 18 C. B. N. S. 479; 34 L. J. C. P. 150. The sheriff may take in execution goods pledged to a pawnbroker, whether redeemable or not, and may sell them when the period for redemption has expired: Re Rollason, 56 L. J. C. 768; L. R. 34 C. D. 495.

<sup>(</sup>k) Robinson v. Walter, 3 Bulstr. 269; Crosier v. Tomkinson, 2 Kenyon, 439; Barnes, 472.

<sup>(</sup>l) Francis v. Wyatt, 1 W. Bl. 483; 3 Burr. 1498; Parsons v. Gingell, 4 C. B. 545; but see Cockburn, C. J., Miles v. Furber, L. R. 8 Q. B. 82; 42 L. J. Q. B. 41; Cocks v. Gray, 1 Giff. 77; 26 L. J. C.

<sup>(</sup>m) Co. Lit. 47 a; Gisbourn v. Hurst, 1 Salk. 249; Alderson, B., Muspratt v. Gregory, 1 M. & W. 647; Blackburn, J., Lyons v. Elliott, L. R. 1 Q. B. D. 214; 45 L. J. Q. B. 159.

are enveloped" (n). But there is no privilege for a conveyance sent for the delivery of goods not privileged; as in the case of a boat sent by a buyer to the premises of the seller to be laden with goods there sold and delivered by the latter in the way of his trade (o). The conveyance in such cases so long as retained in the possession of the owner, while waiting for and discharging or loading goods, would be privileged by reason of the personal use and possession (p).

Cattle taken in to feed.

Cattle taken in to agist or feed had no privilege at common law(q); but they are now conditionally privileged by the Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, s. 45, which provides that "where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies, to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord for rent, where there is other sufficient distress to be found; and if so distrained there shall not be recovered by such distress a sum exceeding the amount so agreed to be paid for the feeding." Cattle put on by the owner, having purchased the exclusive right to feed the grass on the land, are not privileged under this section (r). The "fair price" in the above section may be settled by way of barter as well as in cash; as by agisting cattle for their milk (s). By sect. 46, any dispute in respect of any distress having been levied contrary to this Act may be heard and determined by the County Court, or by a court of summary jurisdiction.

Protection of the goods of lodgers. By the statute 34 & 35 Vict. c. 79, "An Act to protect the goods of lodgers against distresses for rent due to the

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(n) Alderson, B., Muspratt v.
Gregory, 1 M. & W. 647.
(o) Muspratt v. Gregory, 1 M. &
W. 633; 3 ib. 677.
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Fowkes v. Joyce, 2 Vern. 129; Horsford v. Webster, 1 C. M. & R. 696.
(r) Masters v. Green, L. R. 20
Q. B. D. 807.

(s) London & Yorkshire Bank v. Belton, L. R. 15 Q. B. D. 457; 54 L. J. Q. B. 568.

<sup>(</sup>p) Ib., antc, p. 448; Rede v. Burley, Cro. Eliz. 549.

<sup>(</sup>q) Rolle, Abr. "Distress." See

superior landlord," it is enacted, s. 1, "If any superior landlord shall levy a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord with a declaration in writing setting forth that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due from such lodger to his immediate landlord; and such lodger may pay to the superior landlord the rent, if any, so due, or so much thereof as shall be sufficient to discharge the claim of such superior landlord." Sect. 2, "If any superior landlord, after being served with the before-mentioned declaration, and after the lodger shall have paid or tendered the rent which by the last section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord shall be deemed guilty of an illegal distress" (t). -If a landlord, having distrained the goods of a lodger, sells them within the statutory five days, the lodger may maintain an action for the irregularity; for he is prevented by the sale of the goods from serving a declaration entitling him to the benefit of the Act(u).

Goods in the custody of the law are privileged from dis- Goods in tress; such is the position of things already distrained; custody of and of things taken in execution, so long as the sheriff retains possession (v).—But in the case of things taken in Goods taken execution it has been provided by the statute 8 Anne, c. 14, s. 1 (w), "that no goods or chattels whatsoever, being

9 Q. B. D. 245; Heawood v. Bone, L. R. 13 Q. B. D. 179.

(u) Sharp v. Fowle, L. R. 12 Q. B. D. 385; 53 L. J. Q. B. 309.
(v) Co. Lit. 47 a; Wharton v. Naylor, 12 Q. B. 673. See Blades v. Arundale, 1 M. & S. 711.

(w) As to things taken in execution by the County Court, see the County Courts Act, 1888, s. 160.

<sup>(</sup>t) As to the form and service of the declaration, see Thwaites v. Wilding, L. R. 12 Q. B. D. 4; 52 L. J. Q. B. 734; Ex parte Harris, 55 L. J. M. 24. As to what constitutes a lodger within the meaning of the Act, see Phillips v. Henson, L. R. 3 C. P. D. 26; 47 L. J. C. P. 273; Morton v. Palmer, 51 L. J. Q. B. 7; Ness v. Stephenson, L. R.

in or upon any messuages, lands or tenements which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution, pay to the landlord of the said premises all such sum or sums of money as are or shall be due for rent due for the said premises at the time of taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord one year's rent, may proceed to execute his judgment as he might have done before this Act; and the sheriff is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money." -The sheriff may rightfully carry out the execution until he has notice of rent being due; but on having such notice at any time before removal of the goods and payment of the proceeds to the execution creditor, he cannot proceed with the execution unless the rent is paid; and if he does, he is liable to an action at the suit of the landlord (x). The damage in such action is primâ facie to the amount of one year's rent due; but it is open to the sheriff to show in mitigation of damages that the value of the goods removed was less than that amount (y). No formal notice or demand of the rent is required; it is sufficient if the sheriff is proved to have had notice of rent being due; but the sheriff is not bound to inquire, or to give notice of the execution to the landlord (z). In an action by the execution creditor against the sheriff for not levying under his writ, it is a sufficient answer that he had notice of rent due and that the

Liability of sheriff after notice of rent due.

<sup>(</sup>x) Palgrave v. Windham, 1 Strange, 212; Armitt v. Garnett, 3 B. & Ald. 440; Cocker v. Musgrove, 9 Q. B. 223; Wharton v. Naylor, 12 Q. B. 673.

<sup>(</sup>y) Thomas v. Mirchouse, L. R. 19 Q. B. D. 563; 56 L. J. Q. B. 653.

<sup>(</sup>z) Andrews v. Dixon, 3 B. & Ald. 645; see Smith v. Russell, 3 Taunt. 400.

execution creditor refused to pay it; for "until the rent be paid, there are no goods out of which the sheriff is bound to levy, that is, which he is bound to sell (a)."

Goods sold in execution upon the premises retain the Goods sold privilege from distress during a reasonable time for removal; but if afterwards left by the buyer for an unreasonable time, the execution is at an end and the privilege ceases; the landlord then has no claim under the statute, but is free to distrain (b). Thus growing crops taken and sold in execution are privileged from distress for the rent due at the time of taking them, until they are cut and carried; but if left upon the ground for an unreasonable time (which is a question of fact with reference to the circumstances of the case), they become liable to be distrained for that and for subsequent rent (c).—The landlord can only claim under Rent pending the statute of Anne the rent accrued due at the time of taking the goods in execution, and not rent accruing due pending the execution (d). But by 14 & 15 Vict. c. 25, s. 2, in the case of growing crops seized and sold by virtue of any execution, "such crops, so long as the same shall remain on the land, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue due after any such seizure and sale, and to the remedies by distress for recovery of such rent."—By Goods to be used upon the 56 Geo. III. c. 50, "An Act to regulate the sale of farming premises. stock taken in execution," the sheriff is prohibited from selling or carrying off crops or produce contrary to the covenants and agreements of the tenant; but he may sell them subject to agreement to use them upon the premises; and in all such cases it shall not be lawful for the landlord to distrain such crops or produce, or any beasts or implements employed in working or consuming them (e).

<sup>(</sup>a) Cocker v. Musgrove, 9 Q. B.

<sup>(</sup>b) Smith v. Russell, 3 Taunt. 400; Re Davis, Ex parte Pollen, 55 L. J. Q. B. 217.

<sup>(</sup>c) Eaton v. Southby, Willes, 131; Peacock v. Purvis, 2 B. & B. 362; Wright v. Dewes, 1 A. & E. 641;

<sup>(</sup>e) Wright v. Dewes, 1 A. & E.

Wharton v. Naylor, 12 Q. B. 673. (d) Hoskins v. Knight, 1 M. & S. 245; Reynolds v. Barford, 7 M. & G. 449; Re Davis, 55 L. J. Q. B.

Goods in possession of receiver. Goods in the possession of a receiver of the Court of Chancery are considered as in the possession of the Court by its officer, and no distress or proceeding can be taken to interfere with the possession without leave of the Court; which would in general be granted to a landlord to secure the priority of his claim for rent (f).

Goods in bankruptcy.

The goods of a bankrupt vested in the receiver or trustee under the Bankruptcy Acts are in a similar position; but the right to distrain for rent is reserved to the landlord, subject to limitation (g). By the Bankruptey Act, 1883, 46 & 47 Vict. c. 52, s. 42 (1) (re-enacting Bankruptey Act, 1869, s. 34), "the landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for one year's rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available." (2) "For the purposes of this section the term 'order of adjudication' shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who died insolvent" (h).— If the trustee in bankruptcy do not disclaim the lease under sect. 55, the landlord may distrain in full for rent accrued due subsequent to the bankruptcy.

Goods of company under winding-up. By the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 163, "where any company is being wound up by the Court or subject to the supervision of the Court, any dis-

<sup>(</sup>f) Re Sutton, 32 L. J. C. 437; Russell v. East Anglian Ry., 3 Mac. & G. 118; Re Suffield, L. R. 20 Q. B. D. 693.

<sup>(</sup>g) Ex parte Till, L. R. 16 Eq. 97; 42 L. J. B. 84; Ex parte

Cochrane, L. R. 20 Eq. 282; 44 L. J. B. 87.

<sup>(</sup>h) See sects. 122, 125; Re Fryman's Estate, L. R. 38 C. D. 468; 57 L. J. C. 862.

tress or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void." But this section is to be read together with sect. 87, as excepting "proceedings with leave of the Court and subject to such terms as the Court may impose" (i).—The Court will not in general give leave to distrain for arrears of rent due at the commencement of the winding-up; for which the landlord must prove as a debt like any other creditor (i). But the Court gave leave to distrain for such arrears against goods and effects of the company which were charged beyond their value to debenture holders, because the company retained no property in them (k). As to rent accrued due since the commencement of winding-up, the Court will give leave to distrain when it is inequitable that the company should rely upon the above sect. 163; as where the possession of the land has been retained for the benefit of the company, or for the winding-up, so that the rent may be charged as costs properly incurred; but not where it has been retained partly for the benefit of the landlord (1). A mortgagee, applying to distrain for his interest as rent under an attornment clause in the mortgage deed, was refused leave (m). An action of debt for rent will not lie against a liquidator, holding the land merely in that capacity (n).—A landlord may distrain upon premises held by his tenant as trustee for a company, for all arrears accrued due both before and after winding-up of the company; for he is not a creditor of the company and has no right of proof for the rent; and in such distress he may take any goods of the company found upon the premises (o). So a landlord may distrain upon the premises

<sup>(</sup>i) Re Exhall Coal Co., 4 D. J. & S. 377; 33 L. J. C. 595; Re Lancashire Cotton Co., L. R. 35 C. D. 656; 56 L. J. C. 761.

(j) Re Traders' Co., L. R. 19 Eq. 60; 44 L. J. C. 172; Re Coal Consumers' Ass., L. R. 4 C. D. 625; 46 L. J. C. 501.

(k) Re New Cith Club T. D. 24

<sup>(</sup>k) Re New City Club, L. R. 34 C. D. 646; 56 L. J. C. 332.

<sup>(</sup>l) Re Lancashire Cotton Co., L. R. 35 C. D. 656; 56 L. J. C. 761; Re Oak Pit's Colliery, L. R. 21 C. D. 322; 51 L. J. C. 768. (n) Re Lancashire Cotton Co.,

supra.

<sup>(</sup>n) Graham v. Edge, L. R. 20 Q. B. D. 683; 57 L. J. Q. B. 406. (o) Re Exhall Coal Co., 4 D. J. & S. 377; 33 L. J. C. 595; Re Lundy

of a tenant who has sub-let to a company, for all arrears of rent; and he may take goods of the company upon the premises (y).

## § 3. Wrongful Distress.

Wrongful distress.

Illegal distress—distress taken in illegal manner—distress where no rent due—distress after tender of rent due—second distress for same rent—separate distresses.

Irregular distress—trespass ab initio—actions for irregular distresses.

Excessive distress—value of distress taken—distress for excessive claim. Rescue—pound breach.

Replevin—jurisdiction of sheriff—jurisdiction of County Court—security to prosecute—avowry and cognizance—writ of capias in withernam.

Wrongful distresses are distinguished as being illegal, irregular, or excessive:—An illegal distress is where the goods are taken in an illegal manner, or taken without any right to distrain, or detained after the right to distrain has ceased.—An irregular distress is a distress taken legally under a right to distrain, but afterwards conducted in an irregular manner.—An excessive distress is where goods are taken to an excessive amount in proportion to the rent due. The different remedies and circumstances of the wrong require these forms of wrongful distress to be treated separately.

Illegal distress. An illegal distress, whether taken in an illegal manner, or without right to distrain, is a trespass, for which the tenant or owner of the goods may bring an action; and in such action he may recover the goods taken, or their full value as damages, without any reduction on account of rent due; for the person thus taking goods illegally is not

Granite Co., L. R. 6 Ch. 462; 40 L. J. C. 588; Re Regent Stores, L. R. 8 C. D. 616; 47 L. J. C. 677. (y) Re Carriage Supply Ass., L. R. 23 C. D. 154; 52 L. J. C. 472; Re New City Club, L. R. 34 C. D. 646; 56 L. J. C. 332.

allowed to say that he has applied the goods in satisfaction of rent against the will of the owner (z). The following Distress taken are instances of illegal distress, according to the rules in illegal manner. above stated for making a legal distress, which may be treated as distinct trespasses:—Distress made after the tenancy and possession has ceased; or after the six months allowed by the Statute 8 Anne, c. 14, where the possession is continued (a).—Distress made on the highway, or elsewhere than on the demised premises; except goods fraudulently removed to avoid the distress, which may be taken wherever they may be found (b).—Distress made in the night time, between sunset and sunrise (c).—Distress made by unlawfully breaking into the premises (d).—Distress taken of things not distrainable; or of things privileged from distress, where other distrainable goods might be taken(e).

Distress when no rent is due, or without any right to Where no distrain, is a trespass at common law(f). And by the rent due. Statute 2 W. & M. sess. 1, c. 5, giving the power of selling goods distrained for rent, it is enacted (sect. 5) that "in case any such distress and sale as aforesaid shall be made for rent pretended to be in arrear and due, where in truth no rent is in arrear or due to the person distraining, then the owner of such goods or chattels distrained and sold as aforesaid, shall and may, by action of trespass or upon the case to be brought against the person so distraining, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit."

A sufficient tender of the rent due makes the subsequent After tender taking of a distress wrongful; a tender after taking a distress and before impounding makes the subsequent detainer of the goods wrongful; tender after the impounding is too

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(z) Per cur., Attack v. Bramwell,
3 B. & S. 520; 32 L. J. Q. B. 146.
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<sup>(</sup>a) Ante, p. 428. (b) Ante, p. 430.

<sup>(</sup>c) Ante, p. 435.

<sup>(</sup>d) Ante, p. 435; Attack v. Bram-well, 3 B. & S. 520; 32 L. J. Q. B.

<sup>(</sup>e) Ante, p. 444; Nargatt v. Nias, 1 E. & E. 439; 28 L. J. Q. B. 143; Keen v. Priest, 4 H. & N. 236; 28 L. J. Ex. 157.

<sup>(</sup>f) Co. Lit. 160 b.

late and has no effect in avoiding the distress, the goods then being in custody of the law and recoverable only by legal process. The owner of the goods must then replevy the goods and bring an action of replevin, the judgment in which assesses the amount due, if any, with return of the goods replevied as security for payment; he may afterwards tender the amount assessed to redeem the goods and render further detainer wrongful (g). The same rule applies to an impounding or securing upon the premises under the Statute 11 Geo. II. c. 19, s. 10; although the taking and impounding under that statute may be one and the same act (h). A tender after impounding and within the five days allowed by statute for replevin before sale prevents a sale, but does not otherwise invalidate the distress, which may be kept impounded as a pledge at common law. A sale after tender within the five days is wrongful, and the owner of the goods may recover the value (i).

Second distress for same rent. A second distress for the same rent is illegal, unless the first distress failed to satisfy the rent without any fault of the distrainor. A second distress may be taken, where there were not sufficient distrainable goods upon the premises to satisfy the first; or where insufficient goods were taken by mistake of their value (j); or where the first was withdrawn at the request of the tenant, or upon an agreement by him for payment of the rent which he has failed to perform (k). But no other distress can be made, if a former distress has been voluntarily withdrawn

Green v. Duckett, L. R. 11 Q. B. D. 275; 52 L. J. Q. B. 435; Browne v. Powell, 4 Bing. 230.

(i) Johnson v. Upham, 2 E. & E. 250; 28 L. J. Q. B. 252; ante, p. 443.

(j) Hutchins v. Chambers, 1 Burr. 589; Wallis v. Savill, 2 Lutw. 1532.

(k) Thwaites v. Wilding, L. R. 11 Q. B. D. 421; 52 L. J. Q. B. 737. See Holland v. Bird, 10 Bing. 15.

<sup>(</sup>g) 2 Co. Inst. 107; Pilkington's Case, 5 Co. 76 a; 8 Co. 147 a, Six Carpenters' Case; Evans v. Elliott, 5 A. & E. 142.

<sup>(</sup>h) Firth v. Purvis, 5 T. R. 433; Thomas v. Harries, 1 M. & G. 695, Maule, J., dissentiente. In the case of cattle distrained damage feasant and impounded in a private pound, the tender of a sufficient sum for damages may be made at any time.

by the distrainor without sufficient reason (l); or if the distrainor wilfully takes an insufficient distress, where a sufficient distress might have been taken (m).—An entire Separate rent cannot be divided for making separate distresses; but distresses. rent falling due at different times may be distrained for separately; or one distress may be made for all arrears then due under the same demise (n).

At common law an irregularity in the conduct of a Irregular distress vitiated the whole, and rendered the original entry and taking wrongful; according to the doctrine of law, that "when entry, authority, or licence is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio" (o). Consequently at common law Trespass the tenant might sue for an irregular distress as an ori- ab initio. ginal trespass, and recover full damages independently of rent due (p). But the application of this doctrine to the conduct of a distress was taken away by the statute 11 Geo. II. c. 19. Sect. 19 of which, after a preamble stating "the very great hardship upon landlords and other persons entitled to rents, that a distress duly made should be thus in effect avoided for any subsequent irregularity," proceeds to enact "that where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his or their agents. the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it to be deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity

<sup>(1)</sup> Smith v. Goodwin, 4 B. & Ad. 413; Lear v. Caldecott, 4 Q. B. 123; Dawson v. Cropp, 1 C. B. 961; Bagge v. Mawby, 8 Ex. 641; 22 L. J. Ex. 236.

<sup>(</sup>m) Anon., Cro. Eliz. 13; Wallis v. Savill, 2 Lutw. 1536; Hutchins

v. Chambers, 1 Burr. 589.

<sup>(</sup>n) Hutchins v. Chambers, 1 Burr. 589; Gambrell v. Falmouth, 4 A. &

<sup>(</sup>o) Per cur., Six Carpenters' Case, 8 Co. 146 a. The doctrine does not apply to an authority or licence given by a party. Ellenborough, C.J., Ditcham v. Bond, 3 Camp. 526. (p) Ante, p. 460.

shall or may recover full satisfaction for the special damage he or they shall have sustained thereby and no more." Sect. 20 provides "that no tenant or lessee shall recover in any action for any such unlawful act or irregularity, if tender of amends hath been made by the party distraining before such action brought."—The effect of the statute is to preserve the validity of the distress and of the sale under it from being affected by a mere irregularity in conducting it (q); and to limit the claim of the tenant to the damage caused by the irregularity, deducting the rent due and the charges of the distress so far as it was regular; and if no special damage be proved, he is not entitled to nominal damages upon mere proof of the irregularity (r).

Actions for irregular distresses.

The following irregularities have been held actionable under the statute: Selling the goods distrained before the expiration of the statutory five days (s); selling without a proper appraisement (t); not selling for the best price that could be got (u); selling growing crops standing (r); not leaving the over-plus of the price, after satisfying the rent and charges, in the hands of the sheriff for the owner's use (w).—Trespasses committed in excess of the right of distress are not irregularities within the statute, but form distinct causes of action: As turning the tenant out of possession (x); remaining in possession after the time allowed by law (y); breaking into the premises; taking non-distrainable goods and the like (z).

<sup>(</sup>q) Wollace v. King, 1 H. Bl. 13;

<sup>(</sup>q) Watace V. Ring, 111. Br. 18, Lyon v. Weldon, 2 Bing. 334. (r) Rogers v. Parker, 18 C. B. 112; 25 L. J. C. P. 220; Lucas v. Tarleton, 3 H. & N. 116; 27 L. J. Ex. 248; Biggins v. Goode, 2 C. &

<sup>(</sup>s) Wallace v. King, 1 H. Bl. 13; Sharp v. Fowle, L. R. 12 Q. B. D. 385; 53 L. J. Q. B. 309.

<sup>(</sup>t) Biggins v. Goode, 2 C. & J. 364.

<sup>(</sup>u) Poynter v. Buckley, 5 C. & P. 512; Thompson v. Wood, 4 Q. B. 493.

<sup>(</sup>v) Rogers v. Parker, 18 C. B. 112; 25 L. J. C. P. 220. (w) Lyon v. Tomkies, 1 M. & W.

<sup>(</sup>x) Etherton  $\nabla$ . Popplewell, 1 East, 139; Smith v. Ashforth, 29 L. J.

<sup>(</sup>y) Winterbourne v. Morgan, 11 East, 395; ante, p. 443. (z) Ante, p. 461.

An excessive distress consists in taking goods unreason- Excessive ably in excess of what is necessary to secure the rent due. By the Statute of Marlebridge, 52 Hen. III. c. 4, declaratory of the common law, it is enacted that "distresses shall be reasonable, and not too great; and he that taketh great and unreasonable distresses, shall be grievously amerced for the excess of such distresses." An action lies upon this statute for taking an excessive distress; but the distress is not on that account void, and it may be detained for the rent in fact due (a). The tenant in such action is entitled to at least nominal damages for being deprived for a time of the use of his goods; and he may recover substantial damages on that account, or for having to procure sureties to an excessive amount to replevy the goods; or for having to pay a sum in excess of the rent due to redeem the goods (b). He may recover for an excessive distress of growing crops, though they are not removeable until ripe, by reason of the inconvenience of being deprived of the possession and management (c). He may recover in respect of goods of which he has the mere possession and enjoyment, without any legal or

A landlord is not bound to calculate very nicely the value Value of of the goods seized. "All that he is bound to do is, to trained. exercise a reasonable and an honest discretion; he is authorized to protect himself by seizing what any reasonable man would think adequate to the satisfaction of his claim" (e). "For example, if the lord distrains an ox or a horse for a penny, if there were no other distress upon the land holden, the distress is not excessive; but if there were a sheep or swine, &c., then the taking of the ox or horse is excessive,

equitable ownership (d).

<sup>(</sup>a) Hutchins v. Chambers, 1 Burr. 590; Lynne v. Moody, 2 Str. 851.
(b) Chandler v. Doulton, 3 H. & C. 553; 34 L. J. Ex. 89. See Bayliss v. Fisher, 7 Bing. 153.

<sup>(</sup>c) Piggott v. Birtles, 1 M. & W.

<sup>(</sup>d) Fell v. Whittaker, L. R. 7 Q. B. 120; 41 L. J. Q. B. 78. (e) Wilde, C. J., Rođen v. Eyton, 6 C. B. 430; Bayley, J., Wil-loughby v. Backhouse, 2 B. & C. 823.

because he might have taken a beast of less value" (f). The excess is tested by the real value of the goods, and not conclusively by the proceeds of a sale of them, though that is prima facie evidence of their value; and the distress may be proved excessive, though the sale did not in fact realise the rent due (g). If gold and silver be taken, which have a certain known value, the excess is apparent upon the face of it, and the taking of the excess amounts to a trespass (h).—In computing the amount of rent due for which the distress may be taken, allowance is to be made for ground rent, land tax, property tax, and other charges paid by the tenant in relief of the land or the landlord, which he may be entitled to consider as payments in reduction of the rent (i).

Distress for excessive claim.

A distress for an excessive claim of rent beyond what is in fact due is not actionable, unless the excessive claim is the cause of some special damage to the tenant. The landlord is not concluded by the amount of his claim, but may limit the seizure and sale to the sum really due, so as to avoid an excessive distress (j). A person in distraining is not bound to give any notice of the cause of the distress, except as a statutory condition of selling the goods taken; and he may allege one cause for the distress and justify for another (k). Accordingly, a landlord having distrained upon two tenements as claiming the sum of rents due for each, it was held that he might justify the distress as constituting separate distresses for the several rents (l).

Rescue.

If a distress is illegal, the tenant may resist the taking with force; as where no rent is due, or where cattle are

<sup>(</sup>f) 2 Co. Inst. 107.
(g) Smith v. Ashforth, 29 L. J. Ex. 259; ante, p. 442.
(h) Moir v. Munday, cited in Hutchins v. Chambers, 1 Burr. 590, and in Crowther v. Ramsbottom, 7 T. R. 658.

<sup>(</sup>i) Carter v. Carter, 5 Bing. 406; see Sapsford v. Fletcher, 4 T. R. 511; Taylor v. Zamira, 6 Taunt.

<sup>524;</sup> Clennell v. Read, 7 Taunt. 50. 524, Cleintet V. Reud, 7 1 aunt. 50., (j) Tancred v. Leyland, 16 Q. B. 669; 20 L. J. Q. B. 316; Glyn v. Thomas, 11 Ex. 870; 25 L. J. Ex. 125; French v. Phillips, 1 H. & N. 564; 26 L. J. Ex. 82.

<sup>(</sup>k) Ante, p. 440. Per cur. Crow-ther v. Ramsbottom, 7 T. R. 654.

<sup>(</sup>l) Phillips v. Whitsed, 2 E. & E. 804; 29 L. J. Q. B. 164.

distrained in the highway, or where goods are taken which are privileged from distress. After an illegal distress has been taken, the tenant may rescue or retake it at any time before it has been impounded; when impounded it is in the custody of the law, and he must proceed to recover possession by replevin (m).—Pound-breach, or breaking Pound the pound to rescue a distress, is a misdemeanor, indictable breach. at common law. The party distraining has also a remedy for pound-breach or rescue by retaking the goods, or by action. And by the statute 2 W. & M. c. 5, s. 4, it is enacted "that upon any pound-breach or rescous of goods or chattels distrained for rent, the person grieved thereby shall, in a special action upon the case, recover his treble damages and costs of suit against the offender; or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession." The statute applies to pound-breach where the impounding is upon the premises under the statute 11 Geo. II. c. 19 (n). If the distrainor quits possession, and the owner retakes the goods, it is no rescue (o). So, if a distrainor takes the goods out of pound for the purpose of using them, it is an abuse of the distress which renders the detaining wrongful, and the owner of the goods may retake possession (p).

Replevin is a summary proceeding by the owner of Replevin. goods taken in distress for obtaining an immediate return of possession, upon giving security to prosecute an action for the taking; in which action, if the distress be proved illegal, he may recover damages; but if legal, he may be adjudged to return the goods distrained (q). Replevin

may be obtained at any time before the property in the

<sup>(</sup>m) Co. Lit. 160 b, 161 a; 4 Co. 11 b, Bevil's Case; Cotsworth v. Betison, 1 L. Raym. 104; 1 Salk. 247; Firth v. Purvis, 5 T. R. 432. See Parrett Nav. Co. v. Stower, 6 M. & W. 564.

<sup>(</sup>n) Firth v. Purvis, 5 T. R. 432.

<sup>(</sup>c) Knowles v. Blake, 5 Bing. 499; Dod v. Monger, 6 Mod. 216. (p) Smith v. Wright, 6 H. & N. 821; 30 L. J. Ex. 313. (q) Co. Lit. 145 b; per cur. Mennie v. Blake, 6 E. & B. 842; 25 L. J. Q. B. 401.

goods has been changed by sale under the distress (r); and being an *ex parte* proceeding, it does not affect the distrainor, or render a sale wrongful until he has notice thereof (s). It seems that a tenant cannot contract himself out of the common law right to replevy, and that a clause of distress expressed to be free of replevin is so far void of effect (t).

Jurisdiction of sheriff.

By the Statute of Marlebridge, 52 Hen. III. c. 21, the sheriff was invested with original jurisdiction to grant replevin, and by the statute of West. II., 13 Edw. I. c. 2, it was required "that sheriffs shall not only receive of the plaintiffs pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded" (u). By the statute 11 Geo. II. c. 19, s. 23, "to prevent vexatious replevins of distresses taken for rent," it was required that the sheriff should take in his own name from the plaintiff and two responsible persons as sureties, "a bond in double the value of the goods distrained, and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained in case a return of the goods shall be awarded." And it was further required that if the bond were forfeited the sheriff should assign the bond to the distrainor at his request, that he might bring an action and recover thereupon in his own name.

Jurisdiction of County Court.

The jurisdiction to grant replevin has by recent statutes been transferred from the sheriff to the County Courts. By the County Courts Act, 1888, 51 & 52 Vict. c. 43 (repealing and re-enacting in similar terms provisions of the County Courts Act, 1856), it is enacted as follows:—Sect. 134. "The sheriff shall have no powers and responsibilities with respect to replevin bonds and replevins; but

<sup>(</sup>r) Jacob v. King, 5 Taunt. 450; ante, p. 443.

<sup>(</sup>s) Mounsey v. Dawson, 6 A. & E.

<sup>(</sup>t) Co. Lit. 145 b; 2 Co. Inst. 140. (u) 2 Inst. 139. There may be a special franchise to grant replevin. Mounsey v. Dawson, 6 A. & E. 752.

the registrar of the Court of the district shall be empowered, subject to the regulations hereinafter contained, to approve of replevin bonds, and to grant replevins, and to issue all necessary process in relation thereto; and such process shall be executed by the bailiff. Such registrar shall, at the instance of the party whose goods shall have been seized, cause the same to be replevied to such party, on his giving one or other of such securities as are mentioned in the next two succeeding sections."

Sect. 135. "Where a replevisor shall wish to commence Security to proceedings in the High Court he shall, at the time of prosecute. replevying, give security, to be approved of by the registrar, for an amount sufficient to cover the alleged rent or damage, and the probable costs of the cause in the High Court, conditioned to commence an action of replevin against the seizor in the High Court, within one week from the date thereof, and to prosecute such action with effect and without delay, and, unless judgment thereon be obtained by default, to prove before such superior Court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, the rent or value whereof exceeded 201. by the year, was in question, or that such rent or damage, or the value of the goods seized, exceeded 20%, and to make return of the goods if a return thereof shall be adjudged." Sect. 136, requires the replevisor to give security to the like amount, conditioned for bringing an action of replevin in the County Court, but without the condition as to title and amount of claim.

In the action of replevin the pleading of the defendant Avowry and is technically called an avowry or cognizance, the former cognizance. being the justification of the distrainor in his own right, the latter that of a bailiff in right of the distrainor. It is equivalent to an original statement of claim for rent due; to which the plaintiff in replevin must plead as if he were in the position of defendant, and therefore his answer is called a plea, instead of a replication. The judgment for

in withernam.

the plaintiff in replevin is to recover the damages of the wrongful taking and the costs of suit; the judgment for the defendant is that he have a return of the goods to hold Writ of capias to him irreplevisable, and for damages and costs.—If the goods are eloigned, that is, removed, so that they cannot be delivered in replevin, or under a judgment for return of the distress in an action of replevin, a writ of capias in withernam may be issued, commanding that other goods be taken for the distress in place of those eloigned (v).—The bailiff duly authorized to execute replevin may break into a house or close to take the goods; which cannot be done in execution of a distress or of any civil process (w). owner of the goods must attend at the place of impounding to receive the goods replevied (x).

> (v) 2 Co. Inst. 140; Chitty's Practice and Forms. (w) Stat. West. I. c. 17; 2 Co. Inst. 193; 5 Co. 93 a, Semayne's

Case; ante, p. 435. (x) Per cur. Hellawall v. Eastwood, 6 Ex. 312.

# SECTION IV. REMEDIES FOR RENT,—(2) ACTION AND RE-ENTRY.

Action for rent-suspended by distress-injunction against distress pending action.

Action of debt for rent-debt from privity of estate-action by executor for arrears of rent-rent a specialty debt.

Covenant to pay rent-privity of contract.

Action for use and occupation.

Condition of re-entry on non-payment of rent-demand of paymentejectment-relief against condition-condition of entry to take profits.

Summary proceedings for recovery of possession.

Jurisdiction to grant a receiver or sale—remedies under Conveyancing Act, 1881.

The landlord or lessor, instead of distraining, may pro- Action for ceed by action to recover rent; but if he distrains, no rent, action will lie for the same rent pending the distress. The effect of a distress in suspending the right of action suspended by is independent of the sufficiency of the goods taken, which distress. is necessarily uncertain until the value is ascertained by sale (a). If a distress fails to produce satisfaction of the rent from any cause not due to the fault of the landlord; as if it perishes, or escapes, or is rescued, or is relinquished at the request of the tenant, or produces by sale an insufficient sum; the landlord may then distrain again, or he may proceed by action to recover the rent remaining due; and it lies upon the tenant, if he relies upon the distress as an answer to the claim for rent, to prove that it produced satisfaction, or failed to do so by some default of the landlord (b).—An injunction was granted against a landlord Injunction. distraining, pending an action respecting the liability to

<sup>(</sup>a) Lehain v. Phillpott, L. R. 10 .Ex. 242; 44 L. J. Ex. 225.

<sup>(</sup>b) Lear v. Edmonds, 1 B. & Ald.

<sup>157;</sup> Lingham v. Warren, 2 B. & B. 36; Hudd v. Ravenor, 2 B. & B. 662; ante, p. 462.

the rent, but only upon the terms of the tenant paying the rent into Court (c).

Action of debt for rent.

The action for the recovery of a freehold rent, that is, a rent issuing out of land for life, in tail, or in fee, whether rent service, rent charge, or rent seck, was, at the common law, by the real action of novel disseisin; the denial of rent upon demand being a disseisin of the The personal action of debt would not lie at common law for freehold rents, for which there was the higher remedy by real action; but it would lie for rents not of freehold, that is rents reserved on leases for years, for which a real action would not lie (e). By the statute 8 Anne, c. 14, s. 4, an action of debt for rent was given for rent service due upon leases for life or lives in the same manner as for rent due upon a lease for years; but this statute did not extend to a rent charge or annuity where the relation of landlord and tenant did not subsist (f). By the statute 3 & 4 Will. IV. c. 27, s. 36, real actions were abolished, and the higher remedy being thus removed, it was held that the personal action of debt would lie for freehold rents of all kinds, whether rent services or rent charges (q).

Debt from privity of estate.

The action of debt may be founded on privity of estate independently of contract, that is to say, the land being considered the debtor, the tenant may be charged as *pernor* or taker of the profits, though he may not be under any personal contract to pay the rent. Hence an action of debt for rent lies against an assignee of the lease or tenancy, and at the suit of an assignee of the rent, upon the privity of estate (h). This doctrine does not apply to

<sup>(</sup>c) Shaw v. Jersey, L. R. 4 C. P. D. 359; 48 L. J. C. P. 308. (d) Lit. ss. 233—236; Fitzherbert, N. B. 178. (e) Lit. ss. 58, 72; Co. Lit. 47 b;

<sup>(</sup>e) Lit. ss. 58, 72; Co. Lit. 47 b; 4 Co. 49 b, Ognell's Case.
(f) Webb v. Jiggs, 4 M. & S. 113; Randall v. Rigby, 4 M. & W.

<sup>133.
(</sup>g) Thomas v. Sylvester, L. R. 8
Q. B. 368; 42 L. J. Q. B. 237;
Christie v. Barker, 53 L. J. Q. B.

<sup>(</sup>h) Walker's Case, 3 Co. 22 a; Allen v. Bryan, 5 B. & C. 512.

land out of the jurisdiction of English Courts; an action will not lie for rent of such land upon ground of privity of estate only, without a personal contract (i). It is also expressly excepted from application to the tithe rent charge by the terms of the Tithe Commutation Act, s. 67, which provides that nothing in the Act "shall be taken to render any person whomsoever personally liable to the payment of such rent charge "(j). It does not apply to the liquidator of a company holding the land in that capacity only (k).

An executor or administrator at common law had an Action by action of debt for arrears of rent reserved on leases for executor for arrears of years, accrued due at the death of the owner; also for rent. arrears of freehold rent of which the deceased owner was tenant for life, the estate of freehold having ceased at his death; and a right of distress was given in such cases by statute 3 & 4 Will. IV. c. 42, ss. 37, 38. Neither the heir nor executor at common law had any remedy for arrears of freehold rents, whether rent services or rent charges, accrued due at death of a tenant of the rent in fee simple, fee tail, or for lives, where the estate of freehold was continuing; but by statute 32 Hen. VIII. c. 37, s. 1, both an action of debt and a right of distress were given to the executor or administrator for such arrears (l). All rents are now apportioned up to the time of death, and the apportionment is recoverable accordingly (m).

The debt for rent is considered as a specialty debt, Rent a spethough the rent be reserved upon a parol demise, and not cialty debt. secured by bond or covenant; and it had the priority of such debts at common law (n). But the statute 32 & 33

<sup>(</sup>i) Cranworth, L. C., Vincent v. Gordon, 4 D. M. & G. 554; Whit-aker v. Forbes, L. R. 10 C. P. 583; 44 L. J. C. P. 332.

<sup>(</sup>j) Ante, p. 400. (k) Graham v. Edge, L. R. 20 Q. B. D. 683.

<sup>(</sup>l) Co. Lit. 162 a; 1 Wms. Saund. 282, Duppa v. Mayo; see

Prescott v. Boucher, 3 B. & Ad. 849; Blackburn, J., Thomas v. Sylvester, L. R. 8 Q. B. 371; 42 L. J. Q. B. 237; ante, p. 392.

<sup>(</sup>n) Ante, p. 419. (n) Thompson v. Thompson, 9 Price, 471; Clough v. French, 2 Coll. 277. See Talbot v. Shrewsbury, L. R. 16 Eq. 28; 42 L. J. C. 877.

Vict. c. 46, which deprived specialty debts of priority in the administration of the estates of deceased persons, extends to debts for rent (o). The doctrine of specialty debts is peculiar to English law, and does not apply to rent of land out of the jurisdiction (p).

Covenant to pay rent.

It is usual in leases for the lessee to enter into an express covenant, binding himself, and his heirs, executors, and assigns for the payment of the rent; and the words of reservation of rent in a lease, as "yielding and paying," and the like, if executed by the lessee, make a covenant, because importing agreement (q). The covenant runs with the land, that is, it is annexed by law to the estate demised and passes with it, so as to bind an assignee of the land for the time being, by reason of the privity of estate, so long as he remains assignee. The benefit of the covenant also runs with the reversion in the land, or in any part thereof (r). The personal liability of the original lessee upon his covenant remains, though he have assigned away his estate, and the lessor have accepted the assignee as tenant, "An action of covenant remains after the estate is gone; but, generally speaking, when the land is gone, the action of debt is gone also, debt being maintainable because the land is debtor. Covenant is founded in a privity collateral to the land" (s). But until the lessor accept the assignee as his tenant, the lessee remains liable to him in debt as well as in covenant (t).

Privity of contract.

Action for use and occupation.

An action lies at common law to recover a reasonable rent or remuneration for the use and occupation of land

(o) Re Hastings, Shireff v. Hastings, L. R. 6 C. D. 610; 47 L. J. C. 137. (p) Vincent v. Gordon, 4 D. M.

& Ġ. 551. (q) 1 Bac. Abr. Covenant B, p. 530; Finch, L. C., Hollis v. Carr,

2 Mod. 91.

(r) Spencer's Case, 5 Co. 17 b; Leake on Contracts, 2nd ed. 1215, 1225, 1231; Conveyancing Act,

1881, 44 & 45 Viet. c. 41, ss. 10,

(s) Wilson, J., Mills v. Auriol, 1 H. Bl. 445; Auriol v. Mills, 4 T. R. 98; Randall v. Rigby, 4 M. & W.

(t) Walker's Case, 3 Co. 22 a; see Mayor of Swansea v. Thomas, L. R. 10 Q. B. D. 48.

under circumstances which raise a presumptive contract to pay for it; and the mere fact of use and occupation of land by permission of the owner is presumptive evidence of a contract to pay to the owner the value of the occupa-"The obligation is co-extensive with and measured by the enjoyment; as soon as the occupation ceases, the implied contract ceases; and as no express time is limited, the remuneration must necessarily accrue from day to day" (u).—In aid of this form of action it was enacted by the statute, 11 Geo. II. c. 19, s. 14, "That it shall be lawful for the landlord to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant in an action on the case for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum, of the damages to be recovered."—The presumptive contract to pay rent arising from the occupation of land may be rebutted by showing that the occupation was under a lease by deed, or under an express contract to a different effect (v), or with a different A claimant cannot waive a trespass and person (w). wrongful occupation of land, and charge a rent as for a permissive use and occupation (x). The possession of a vendor holding over after the time for completion of the sale is adverse, and he cannot be charged by the purchaser with a rent for the use and occupation. If the possession is wrongful he may be turned out by ejectment and is liable in trespass for mesne profits (y). A tenant holding over after the expiration of his lease may be charged for

<sup>(</sup>u) Per cur. Gibson v. Kirk, 1 Q. B. 856; Hellier v. Silcox, 19 L. J. Q. B. 295; Churchward v. Ford, 2 H. & N. 446; 26 L. J. Ex. 354.

<sup>(</sup>v) Hall v. Burgess, 5 B. & C. 332; Walls v. Atcheson, 3 Bing.

<sup>462;</sup> Sloper v. Saunders, 29 L. J. Ex. 275.

<sup>(</sup>w) Cox v. Knight, 18 C. B. 645; 25 L. J. C. P. 314.

<sup>(</sup>x) Turner v. Cameron Coal Co., 5 Ex. 932.

<sup>(</sup>y) Tew v. Jones, 13 M. & W. 12.

use and occupation, and presumptively upon the terms of his lease (m).—The rent payable for the mere use and occupation of land is presumptively measured in amount by the value of the tenement and the duration of the occupation; and it accrues due from day to day until the occupation ceases. When a parol demise or agreement at a fixed rent is shown, it serves to regulate the amount as to the rate and the time of payment (n).

Condition of re-entry on non-payment of rent.

A further security for rent is commonly provided in leases by an express condition for re-entry upon non-pay-At common law an estate of freehold could not be defeated by a breach of condition without actual entry; but a term of years, being a chattel interest arising by contract, might be limited to cease upon a mere condition without entry. Conditions for payment of rent are usually framed in the terms, that if the rent shall be in arrear for a certain time, it shall be lawful for the lessor to re-enter the demised premises and repossess them, as in his former estate, thereby requiring an actual entry by the lessor to enforce the condition, as with estates of freehold upon condition at common law (o). Entry under the condition determines the lease, but it does not discharge the rent due, and the lessor retains an action of debt to recover the arrears (p).

Demand of rent.

The right of re-entry for non-payment of rent was subject at common law to the implied conditions precedent of a demand of the rent, which was required to be made at the appointed time and place of payment, and to specify the exact sum due; and "it was the established rule of the Court of Chancery and of the Courts of common law that no forfeiture of property could be made, unless every

<sup>(</sup>m) Bayley v. Bradley, 5 C. B.
396; Levi v. Lewis, 6 C. B. N. S.
766; 30 L. J. C. P. 141.

<sup>(</sup>n) Tomlinson v. Day, 2 B. & B. 680; per cur. Gibson v. Kirk, 1 Q. B. 856.

<sup>(</sup>o) Lit. ss. 328—331; Rede v. Farr, 6 M. & S. 121; Arnsby v. Woodward, 6 B. & C. 519; Liddy v. Kennedy, L. R. 5 H. L. 134. See aute, Vol. I. p. 226.
(p) 3 Co. 23 b, Walker's Case.

condition precedent had been strictly and literally complied with "(q). The condition of a demand required at common law may be modified or wholly excluded, by express terms of the lease; and the demand must then be made or not according to the terms and in the manner stipulated (r).

By the Common Law Procedure Act, 1852, 15 & 16 Ejectment. Vict. c. 76, s. 210, re-enacting 4 Geo. II. c. 28, s. 2, "In all cases between landlord and tenant as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall or may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises. And if it shall be proved that half-ayear's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, then the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made." The action of ejectment is equivalent to a re-entry, and operates as an unequivocal and conclusive election to determine the lease (s).—"The proper course for a landlord who has a right of re-entry is to bring an action for ejectment, as prescribed in the above statute; yet it is sufficient if the tenant, being in default, chooses to acquiesce in the re-entry" (t). And where proceedings are pending before the Court and the right of re-entry is clear, the Court will order possession to be given up, without an action of ejectment (u). A forcible entry is unlawful by the statute 5 Rich. II. c. 8; and a right of re-entry under a condition of a lease does not justify an entry by force. "The rights

<sup>(</sup>q) Co. Lit. 201 b; per cur. Johnson v. Lyttle's Iron Agency, L. R. 5 C. D. 694.

<sup>(</sup>r) Doe v. Masters, 2 B. & C. 490; Phillips v. Bridge, L. R. 9 C. P. 48; 43 L. J. C. P. 13.

<sup>(</sup>s) Jones v. Carter, 15 M. & W. 718; Grimwood v. Moss, L. R. 7 C. P. 360; 41 L. J. C. P. 239. (t) Re Brain, L. R. 18 Eq. 409; 44 L. J. C. 103.

<sup>(</sup>u) General Share Co. v. Wetley Brick Co., L. R. 20 C. D. 260.

of persons who have a right of entry are to enter in a peaceable manner, and if they cannot do so, they must resort to the Courts "(v).

Relief against condition of re-entry. The Court of Chancery exercised an original jurisdiction to relieve a tenant against a condition of re-entry for non-payment of rent. This jurisdiction is now regulated by statute and may be exercised by all Divisions of the High Court. The tenant may proceed for relief at any time within six months after execution in the ejectment; and in support of such proceeding must bring into Court the arrears of rent claimed and the costs of the landlord (w). The Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 14, providing generally for relief against re-entry and forfeiture for breaches of covenants and conditions in leases, expressly excepts from its effect "the law relating to reentry, or forfeiture, or relief in case of non-payment of rent," which was provided for by previous statutes.

Condition of entry to take profits.

Rent may be further secured by a condition in the lease, that if the rent be in arrear, it shall be lawful for the lessor to enter and hold the land and take the profits to his own use until the arrears are satisfied. Upon such a condition a demand of the rent is not required before entry, as upon the condition to re-enter absolutely, unless it be expressly stipulated for; because there is no forfeiture or transfer of estate, but only an interest by the agreement of the parties to take the profits in the nature of a distress, subject to which the estate of the tenant continues as before. A similar power may be given to secure a rent charge (x).

Summary proceedings for recovery of possession.

By the statute 11 Geo. II. c. 19, s. 16, it is provided, to avoid "the expense and delay of recovering in ejectment,"—"that if any tenant holding any lands, tenements, or hereditaments at a rack rent, who shall be in arrear for one

<sup>(</sup>v) Fry, J., Edwick v. Hawkes, L. R. 18 C. D. 199; S. C. Edridge v. Hawker, 50 L. J. C. 577. (w) 15 & 16 Vict. c. 76, ss. 210 -212; 23 & 24 Vict. c. 126, s. 1.

<sup>(</sup>x) Lit. s. 327; Co. Lit. 203 a; Havergill v. Hare, Cro. Jac. 510; Jemott v. Cowley, 1 Wms. Saund. 112 c; Hassell v. Gowthwaite, Willes, 500; Doe v. Horsley, 1 A. & E. 766.

year's rent, shall desert the demised premises and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent," the landlord or lessor may take proceedings before justices of the peace, as therein prescribed, who are empowered to put him into the possession of the demised premises, "and the lease thereof to such tenant shall from thenceforth become void." By sect. 17, tenants may appeal to the next justices of assize. The landlord must have a right of re-entry in order to proceed under this section (y).—Further summary jurisdiction for recovery of possession is given to justices by the statute 1 & 2 Vict. c. 74, when the term or interest of the tenant of any house, land, or corporeal hereditament, held at will or for any term not exceeding seven years, at a rental not exceeding twenty pounds a year, shall have ended by legal notice to quit or otherwise, and such tenant shall neglect or refuse to deliver up possession. And by Jurisdiction the County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 138 of County Court. (re-enacting the County Courts Act, 1856, s. 50), jurisdiction is given to the County Court "when the term and interest of the tenant of any corporeal hereditament, where neither the value of the premises nor the rent payable shall have exceeded fifty pounds by the year, shall have expired, or shall have been determined by notice to quit, and such tenant shall neglect or refuse to deliver up possession accordingly "(z).

The Court of Chancery had an original jurisdiction, Jurisdiction now extended to all Divisions of the High Court, to raise to grant receiver or sale. rent charges and annuities charged upon land by appointing a receiver of the rents and profits; and, if necessary, by ordering a sale or mortgage of so much of the land as may be required to discharge the arrears (a). But the

<sup>(</sup>y) Ex parte Pilton, 1 B. & Ald.

<sup>(</sup>z) See Friend v. Shaw, L. R. 20 Q. B. D. 374.

<sup>(</sup>a) Duke of Leeds v. Powell, 1 Ves. sen. 171; Cupit v. Jackson, McCl. 495; 13 Price, 721; Graves v. Hicks, 11 Sim. 551; White v. James, 26

Court will not apply the extraordinary remedies of a receiver or sale, unless the ordinary legal remedies of distress, action or entry are unavailable or insufficient (b). The Court ordered a sale of the glebe lands of an ecclesiastical corporation in satisfaction of a rent charge, which had been charged upon the land for a term of years for the execution of improvements under the statutory powers of the Inclosure Commissioners; the rent charge being secured with powers of entry to take the profits and of distress, but these powers having become useless by reason of the land being unoccupied and profitless, and a receiver being useless for the same reason (c). The Court refused to order a sale of land in satisfaction of arrears of the tithe rent charge, because it is a charge upon the annual profits only and not upon the inheritance (d).

Remedies under Conveyancing Act, 1881.

By the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, the remedies for rent charges and other annual sums are given a statutory definition and application. By s. 44 (1), "Where a person is entitled to receive out of any land any annual sum, payable half-yearly or otherwise, whether charged on land or on the income of land, and whether by way of rent charge or otherwise, not being rent incident to a reversion, then, the person entitled to receive the same shall have such remedies for recovering the same as are described in this section."—(2) "If at any time the annual sum is unpaid for twenty-one days, the person entitled may enter into and distrain on the land charged, and dispose according to law of any distress found."—(3) "If at any time the annual sum is unpaid for forty days, then, although no legal demand has been made for payment thereof, the person entitled may enter into possession of,

Beav. 191; 28 L. J. C. 179; Horton v. Hall, L. R. 17 Eq. 437. b) Sollory v. Leaver, L. R. 9 Eq. 22; 40 L. J. C. 398; Kelsey v. Kelsey, L. R. 17 Eq. 495.

<sup>(</sup>c) Scottish Widows' Fund v. Craig, L. R. 20 C. D. 208; 51 L. J. C. 363. (d) Bailey v. Badham, L. R. 30

<sup>(</sup>a) Barley v. Badham, L. R. 30 C. D. 84; 54 L. J. C. 1067; ante, p. 401.

and hold the land charged, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof and all costs occasioned by non-payment are fully paid; and such possession when taken shall be without impeachment of waste."—(4) "In the like case the person entitled, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, to raise and pay the annual sum and all arrears thereof and all costs occasioned by the non-payment."-(5) "This section applies only if and so far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained."—And (6) "This section applies only where that instrument comes into operation after the commencement of this Act."

#### CHAPTER IV.

#### PUBLIC USES OF LAND.

Section I. Highways.
II. Local customs.

#### SECTION I. HIGHWAYS.

§ 1. Highways in general—§ 2. Origin and extinction of highways— § 3. Maintenance and repair of highways—§ 4. Remedies relating to highways.

### § 1. HIGHWAYS IN GENERAL.

Public rights—general and local.

Highway—different kinds of highway—cattle way—railway—navigable river—towing path.

Public way without thoroughfare—public commons and open spaces.

Ownership of soil of highway—land at sides of highway—inclosing up to highway—conveyance of land abutting on highway.

Rights of ownership of highway-trespass on highway.

Ownership of highways under statutes—Turnpike Acts—Public Health Act—Metropolis Local Management Act—compensation for highways taken.

Limits of highway-termini-width-deviation.

Use of highway by public—public meetings—excessive traffic—locomotive engines—tramways—telegraphs.

Special use of highway by adjoining owner—access to and from adjoining tenement—use of highway for service of adjoining tenement—use of public river by riparian owner.

Fencing land adjoining highway—cattle straying through defect of fences—fencing nuisances on adjoining land.

Public rights, general and local. The rights in alieno solo above treated belong to a person in a private or corporate capacity, and are rights of property in the strict meaning of the term. The rights in alieno solo here treated belong to a person only as one of the public; and they differ from rights of property in having no determinate owner, personal or corporate. They are common to the public at large, or to a part of the public limited by a certain locality or

description; and they are distinguished accordingly as being general or local. Of the former kind are all public rights of way, highways, bridges, and the like, which are for the use and accommodation of all subjects of the realm. Of the latter kind are privileges of persons within some limited district of using land for purposes of local convenience; such as a right of way to church or market, or a right of enjoying an open space for exercise or recreation. The former kind of public rights are founded upon the general custom of the realm or common law; the latter upon the special custom of the district or lex loci(a). -The public, as such, can acquire no right to take profits in alieno solo (b).

A public way or highway is a right of passage for the Highway. public in general. It resembles an easement in regard to the servient tenement, but differs from an easement in there being no dominant tenement, without which there can be no easement properly so called. But "in truth, a public road or highway is not an easement; it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation repairing it. It is clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement" (c).

It is said "there be three kinds of ways: first, a foot- Different way; the second is a footway and horseway, and this way. vulgarly is called a pack or drift way also; the third. which contains the other two and also a cartway." But ways may further vary according to the limitations of their creation, as either expressed in terms or implied in

<sup>(</sup>c) Cairns, L. J., Rangeley v. Midland Ry., L. R. 3 Ch. 311; 37 L. J. C. 316. (a) Post, p. 549. (b) Neill v. Devonshire, L. R. 8 Ap. Ca. 135; post, p. 560.

usage (c).-"Highway" is the general term for all kinds of public ways, whether carriageway, horseway, or footway; and it serves to describe them all, except where it is material to state the species of way (d). In the construction of the Highway Acts it is provided that "the word 'highways' shall be understood to mean all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements" (e). In an inclosure Act the word "road" was construed to include a footway (f). The causeways by the sides of high roads are part of the highway, and the surveyor is bound to secure them from injury by carriages (g).—"In general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but the presumption would be for cattle as well as carriages, otherwise cattle could not be driven from one part of the kingdom to another" (h). And an adjacent owner cannot complain of the nuisance caused by the ordinary driving of cattle along the highway (i). But cattle are lawfully on the highway only for the purpose of passing and repassing (i).

Cattle way.

Railway.

A railway constructed under an Act of Parliament, to be used by the public with waggons and carriages, was held to be "a public highway to be used in a particular mode"; and a company incorporated to make and maintain it was held liable to an indictment for taking up the rails, and to a mandamus to restore them (k).—By the Railway Clauses Act, 8 Vict. c. 20, s. 92, as to railways constructed under that Act, it is expressly provided that "upon

<sup>(</sup>c) Co. Lit. 56 a; post, p. 503. (d) Holt, C. J., The Queen v. Saintiff, 6 Mod. 255; Allen v. Ormond, 8 East, 4; Ellenborough, C.J., The King v. Salop, 13 East, 95. (e) 5 & 6 Will. 4, c. 50, s. 5. (f) Logan v. Burton, 5 B. & C.

<sup>(</sup>g) 5 & 6 Will. 4, c. 50, s. 24; Ellis v. Woodbridge, 29 L. J. M. 183.

<sup>(</sup>h) Mansfield, C. J., Ballard v. Dyson, 1 Taunt. 283.
(i) Truman v. London, Brighton Ry., L. R. 11 Ap. Ca. 45; 55 L. J. C. 354.

<sup>(</sup>j) Dovaston v. Payne, 2 H. Bl. 527; 2 Smith, L. C.
(k) The King v. Severn Ry., 2 B. & Ald. 646. See Rowe v. Shil-

son, 4 B. & Ad. 726.

payment of the tolls demandable all persons shall be entitled to use the railway with engines and carriages properly constructed, subject to the regulations to be from time to time made by the company by virtue of the powers hereby and by the special Act conferred upon them." But where special agreements are made with the company for the use of the railway, the rights of the parties are no longer governed by the provisions of the Act, but depend upon the terms of the agreement (l).

A public navigable river is analogous to a highway, and Navigable has the legal rights and incidents of a highway, for passage of the public, for the carriage of goods, and for the accommodation of riparian owners. The right of navigation is generally proved by the immemorial usage, which also prescribes the mode and limits of the navigation (m). Tidal rivers are primâ facie public for navigation at common law; and the right of navigation along a tidal river includes the right of grounding on the bed of the river until the tide serves, whenever it is necessary for the purpose of navigation (n).—A towing path on the bank of Towing path. a public navigable river or canal is a highway for the particular purpose of towing vessels; and for such purpose "the towing path must be taken to include so much of the bank as is reasonably and properly used as such (o)." The right of using the bank of a navigable river for a towingpath does not exist generally at common law; but it may be established by custom, or by special grant, or by statute (p). A towing path may become also a public footway by general use for that purpose (q). The conservators of a river navigation, with statutory powers to maintain the navigation and towing paths and to take (o) Per cur. Winch v. Thames Conserv., L. R. 7 C. P. 469; 41 L. J. C. P. 248.

(p) Ante, p. 158; Ball v. Herbert, 3 T. R. 253; see Simpson v. Scales, 2 B. & P. 496.

<sup>(1)</sup> Great Northern Ry. v. Eastern Counties Ry., 9 Hare, 306; 21 L. J. C. 837.

<sup>(</sup>m) Ante, p. 156. Original Hart-lepool Coll. v. Gibb, L. R. 5 C. D. 713; 46 L. J. C. 311.

<sup>(</sup>n) Colchester v. Brooke, 7 Q. B. 339; ante, p. 162.

<sup>(</sup>q) Grand Junction Canal Co. v. Petty, L. R. 21 Q. B. D. 273; 57 L. J. Q. B. 572; see post, p. 508.

tolls for the use of the same, are held responsible to those using the towing paths for their being in proper repair and condition (q). Such conservators are presumptively not the owners of the soil, but have the right and duty of maintaining the towing paths for the use of the public and preventing obstructions (r). The towing path of a tidal river, that could only be used at certain times of the tide, was held to be extended in use by an improvement in the river, which rendered it navigable at all times (s).

Public way without thoroughfare.

A cul de sac, or way without a thoroughfare, may be public; though there may be difficulty in proving it so by reason of the limited use (t). A public way or street without a thoroughfare cannot be converted into a public thoroughfare by the owner of the adjoining land opening a way through the end (u). If a public highway be legally stopped at one end, it presumptively remains a highway, though no longer a thoroughfare (v). where inclosure commissioners of a parish stopped a footpath through the parish which passed into the adjoining parish, it was held that the part of the footway in the latter parish remained public, though without the former thoroughfare (u). But where the stopping of two roads had the effect of rendering access of the public to an intermediate cross-road impossible, it was held that the latter was no longer a highway (x).

Public commons and open spaces.

Commons and open spaces may be free to the use of the whole public for the purpose of exercise and recreation, under statutes providing in that behalf. The rights of

(q) Winch v. Thames Conserv., L. R. 9 C. P. 378; 43 L. J. C. P. 167. (r) Lee Conserv. v. Button, L. R. 6 Ap. Ca. 685; 51 L. J. C. 17. (s) The King v. Tippett, 3 B. & Ald. 193.

(t) The King v. Lloyd, 1 Camp. 260; Rugby Charity v. Meryweather, 11 East, 375, n.; Wood v. Veal, 5 B. & Ald. 454; Bateman v. Bluck, 18 Q. B. 870; 21 L. J. Q. B. 406; Souch v. East London Ry., L. R. 16

Eq. 108; 42 L. J. C. 477; Vernon v. St. James, Westminster, L. R. 16 C. D. 449; 49 L. J. C. 130.

(u) Woodyer v. Hadden, 5 Taunt.

(v) The King v. Downshire, 4 A.

(w) Gwyn v. Hardwicke, 1 H. & N. 49; 25 L. J. M. 97. (x) Bailey v. Jamieson, L. R. 1 C.

P. D. 329.

the public over such places are analogous to rights of way over highways; but they are generally restricted and regulated by bye-laws made under the statutory powers by which they are created (y). Rights of this kind for the benefit of the local public of a parish or district may be established by local custom (z). The grant of a space for the use of certain houses, as a square or garden, gives a private way only, and no public right of use (a).

In the absence of evidence to the contrary, the pre-Ownership sumption is that the soil of the highway belongs to the of soil of owner of the inclosed lands between which it passes; and if the land on each side of the road is held by different owners, the presumption is that each side of the highway to the medium filum viæ belongs to the owner of the adjoining land (b). The presumption is rebutted by sufficient contrary evidence respecting the ownership; as that the highway was set out under an inclosure Act, which also allotted the ownership of the soil, or left it in the lord of the manor (c). So, where the lord of the manor took tolls and rents for the use of the soil of the highway in a town, for holding markets and other purposes, it was held sufficient evidence to rebut the presumption of ownership in favour of the adjoining tenements (d).

The presumption includes land at the sides of the high- Land at sides way between it and the adjoining inclosure. "It is a prima of highway. facie presumption that waste land on the sides, and the soil to the middle of a highway belongs to the owner of

(y) See the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122); the Commons Act, 1876 (39 & 40 Vict. c. 56); the Metropolitan Open Spaces Act, 1877 (40 & 41 Vict. Commission of the Open Spaces Act, 1887 (50 & 51 Vict. c. 32); the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 20; the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 16; the Commonable Rights Compensation Act, 1882 (45 & 46 Viet. c. 15).

(z) See post, p. 559.

(a) Duncan v. Louch, 6 Q. B.

<sup>(</sup>b) Grose v. West, 7 Taunt. 41. See *Holmes* v. *Bellingham*, 7 C. B. N. S. 329; 29 L. J. C. P. 134; ante, p. 204.

<sup>(</sup>c) The King v. Hatfield, 4 A. & E. 156; Hooper v. Bourne, L. R. 3 Q. B. D. 259.

<sup>(</sup>d) Beckett v. Leeds, L. R. 7 Ch.

the adjoining land. The rule is founded on a supposition, that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure and the middle of the road" (e). Ancient highways, being for the most part uninclosed, gave the liberty of deviating from the beaten track whenever it became impassable, therefore the owner of the land could not inclose without leaving sufficient space for deviation. But when proper provision was made for repair of the road, these spaces were no longer used by the public and reverted absolutely to the owner (f). The rule is not confined to freeholders. "It applies equally whether the party occupying the adjoining land be a freeholder, leaseholder, or copyholder. As to the property, a copyholder stands in the place of the lord; the leaseholder in the place of the lessor" (g).—But where the land between the highway and the adjoining inclosure communicates with open waste or other land, the presumption in favour of the adjoining owner may be met by a stronger presumption that all such land lying together is in the same ownership (h). It may also be met by evidence of ownership of other parts of the land similarly situated; and "it is for the judge to decide whether there is such a unity of character in the different parts as to render evidence, affecting a part not in dispute, admissible with reference to the part in dispute" (i). The presumption may also be rebutted by direct evidence of title to the contrary; as by showing that the land had been allotted under an inclosure Act as being waste of the manor (j).— The owner of land open to the highway may inclose it up to the limit of the highway. The Highway Act, 1864,

Inclosing up to highway.

<sup>(</sup>e) Bayley, J., Doc v. Pearsey, 7 B. & C. 306; Grose v. West, 7 Taunt. 39. (f) Abbot, C. J., Steel v. Prickett, Starkie, 468; Cockburn, C. J., Arnold v. Holbrook, L. R. 8 Q. B. 99; 42 L. J. Q. B. 80.

<sup>(</sup>g) Holroyd, J., Doe v. Pearsey,

<sup>(</sup>y) Adough, v., T. B. & C. 307. (h) Grose v. West, 7 Taunt. 39. (i) Doe v. Kemp, 7 Bing. 332; Simpson v. Dendy, 8 C. B. N. S.

<sup>(</sup>j) Gery v. Redman, L. R. 1 Q. B. D. 161; 45 L. J. Q. B. 267.

27 & 28 Vict. c. 101, s. 51, which imposes a penalty upon an incroachment by building or fencing "on the side of or sides of any carriage-way within fifteen feet of the centre thereof," applies only to the land within the limits of the highway, and not to land at the side of the highway beyond those limits, though within fifteen feet of the centre. The section does not extend the protection of the highway to fifteen feet from the centre, where the highway is in fact less than that width; nor does it protect any part of a highway which is in fact beyond fifteen feet from the centre (k).

A like presumption applies in the construction of con- Conveyance veyances. Where land adjoining a highway is conveyed of land abutby a description in general terms, or as abutting on a highway. highway, "the presumedly right construction is that it passes the soil ad medium filum viæ"; and the presumption. prevails, though reference is made to a plan or measurement which does not include any part of the highway (1). So, "where the owner of two pieces of land conveys them to a purchaser, if a public road lies between them, the soil of the road passes by the conveyance, although the conveyance is silent as to its existence, and although the particular measurement of each piece is given, and would exclude the road "(m).—But where a conveyance described two parcels of land by reference to a plan and schedule, in which they were respectively numbered, and a road lying between them was separately numbered and entered as the property of another, it was held that the conveyance did not pass the road (n). And where the land purchased was described as bounded by an intended new street, it was held that the site of the street did not pass, and, the intention

<sup>(</sup>k) Easton v. Richmond Highway Board, L. R. 7 Q. B. 69; 41 L. J.

M. 25; post, p. 547.
(1) Simpson v. Dendy, 8 C. B.
N. S. 433; Berridge v. Ward, 10
C. B. N. S. 416; per cur. The Queen
v. Strand Union, 4 B. & S. 526; 33 L. J. Q. B. 300.

<sup>(</sup>m) Per cur. Salisbury v. Great Northern Ry., 5 C. B. N. S. 209. See the like rule stated respecting the bed of a river, in Micklethwait v. Newlay Bridge Co., L. R. 33 C. D. 133; ante, p. 154. (n) Salisbury v. Great Northern Ry., 5 C. B. N. S. 174.

not having been carried out, it remained the property of the vendor (o).

Rights of ownership of highway.

"The owner, who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership, not inconsistent therewith" (p). Thus, trees growing upon the highway, though they may be removeable as obstructions to the traffic, presumptively belong to the owner of the soil (q).— The ownership of the soil of a highway is sufficient to entitle the owner to claim superfluous land taken by a railway company adjoining the highway, as being the "adjoining owner" under the Lands Clauses Act, 1845, s. 127; and to preclude the owner of land adjoining the highway on the other side from so claiming (r).—The owner is rateable in respect of the highway, if he derives any profit from it, as in the case of tolls payable for its use (s). But the owners of the soil of a highway were held not chargeable with contribution to the expense of the sewers and paving of a new street, as being "owners of land abutting on such street," under the Metropolis Management Act, 1862, 25 & 26 Vict. c. 102, ss. 52, 77, and the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 150, the ownership not being profitable or beneficial (t).

Trespass on highway.

The owner of the soil may bring an action of trespass for an invasion of his possession (u); and he may maintain an action of ejectment to recover possession of an encroach-

(t) Plumstead Board v. British Land Co., L. R. 10 Q. B. 203; 44 L. J. Q. B. 38; Great Eastern Ry. Vestry v. Cotton, L. R. 16 Q. B. D. 480. See Lightbound v. Bebington Board, L. R. 14 Q. B. D. 853; 55 L. J. M. 94.

(u) Lade v. Shepherd, 2 Strange, 1004; Stevens v. Whistler, 11 East,

51.

<sup>(</sup>o) Leigh v. Jack, L. R. 5 Ex. D. 264; 49 L. J. Ex. 220.
(p) Per cur. St. Mary Newington v. Jacobs, L. R. 7 Q. B. 47; 41 L. J. M. 72.

<sup>(</sup>q) Turner v. Ringwood Highway Board, L. R. 9 Eq. 418.

<sup>(</sup>r) Hooper v. Bourne, L. R. 3 Q. B. D. 259.

<sup>(</sup>s) See The King v. Mersey Nav. Co., 9 B. & C. 95; The King v. Thomas, 9 B. & C. 114; Lewis v. Swansea, 5 E. & B. 508; 25 L. J.

ment wrongfully made (v). The Court will also grant an injunction to restrain a continuing trespass to the soil of a highway; as where a person opened the surface and laid waterpipes in the soil without the consent of the owner. and without any statutory authority for that purpose (u). —A person using a highway for any purpose other than passing and repassing according to the lawful use, is a trespasser against the owner of the soil (x); as if he puts his cattle upon the highway to feed (y). And if cattle are trespassing upon the highway and they escape into the adjacent land through defect of fences, the latter trespass is not excused, as it would be if the cattle were lawfully using the highway for passing only (z). A person who uses a highway in search of game commits a "trespass by entering or being upon land in search of game" within the statute 1 & 2 Will. IV. c. 32, s. 30, and may be convicted of an offence under that statute, which imposes a penalty upon such a trespass (a).

The ownership of the soil of highways vested in public Ownership bodies by Act of Parliament, depends upon the construc- of highways under tion of the Act. The Turnpike Acts did not, in general, statutes. divest the property in the soil. The duty of maintaining the road was vested in trustees; but the property in the soil, and whatever rights were consistent with those of the public, remained as before (b). The Turnpike Acts, Turnpike for the most part, have recently been repealed, and the roads converted into "main roads" under the control of the local authority as surveyor of highways (c).—By the

(v) Goodtitle v. Alker, 1 Burr. 133.

(z) Dovaston v. Payne, 2 H. Bl. 527; 2 Smith, L. C. See Fawcett v. York and Midland Ry., 16 Q. B. 610; 20 L. J. Q. B. 222; post, p. 501. (a) The Queen v. Pratt, 4 E. & B. 860; 24 L. J. M. 113; ante, p. 75. (b) Salisbury v. Great Northern Ry., 5 C. B. N. S. 208; Kenyon, C. J., Davison v. Gill, 1 East, 69. (c) See Highway Act, 1878, 41 & 42 Vict. c. 77, s. 13, post, p. 524.

<sup>(</sup>w) Goodson v. Richardson, L. R. 9 Ch. 221; 43 L. J. C. 790. See The Queen v. Longton Gas Co., 29 L. J. M. 118.

<sup>(</sup>x) Lade v. Shepherd, 2 Strange, 1004; see post, p. 495. (y) Stevens v. Whistler, 11 East,

Act.

Public Health Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 149, "All streets, being highways repairable by the inhabitants at large, within any urban district shall vest in and be under the control of the urban authority." This enactment not only gives the control of the highway, it divests the property and possession of the surface from the former owner and vests it in the local authority for all purposes of the Act(d). The property thus vested includes the herbage growing upon the sides of the highway, so as to entitle the local authority to let it for pasture (e).—The Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, s. 96, enacts in similar words and with the same effect: but the property thus vested in the board, including only so much of the surface as is necessary for the highway, does not entitle the local authority to remove telegraph wires laid across the highway above the houses (f). The property of the local authority in the soil of highways continues only so long as the highways continue; and if they are legally stopped or diverted, the statutory title ceases and the land reverts to the former owner (g).

Compensation for highway

taken.

Metropolis Management

Act.

Acts of Parliament which give statutory powers to take highways for public purposes usually disregard the interest of the original owner of the soil. Thus railway companies generally have powers to take streets and public ways, without compensating the owners of the soil, or dealing with them as for the purchase of land (h). But for tunnelling under a highway they must proceed to purchase the land, or to give compensation in the usual way (i). So gas and water companies are generally empowered to break open the soil of public streets and high-

ways and lay down pipes, without compensation to the

Ex. 723,

<sup>(</sup>d) Burgess v. Northwick Board, L. R. 6 Q. B. D. 264; 50 L. J. C. P. 219.

<sup>(</sup>e) Coverdale v. Charlton, L. R. 4 Q. B. D. 104; 47 L. J. Q. B. 446. (f) Wandsworth v. United Tel. Co., L. R. 13 Q. B. D. 904; 53 L. J. Q. B. 449.

<sup>(</sup>g) Rolls v. St. George, Southwark, L. R. 14 C. D. 785; 49 L. J. C.

<sup>(</sup>h) Touch v. East London Ry., L. R. 16 Eq. 108; 42 L. J. C. 477. (i) Ramsden v. Manchester Ry., 1

owner of the soil, except for damage thereby done to his property below the surface (i).

In pleading a public highway it is not necessary to state Limits of any termini, because, as it is said, "a highway leads over highway, the reliable of the reliab the whole kingdom from sea to sea"; differing in this respect from a private way, in pleading which it is necessary to state both the terminus  $\hat{a}$  quo and the terminus ad quem with certainty (k).

"In the case of an ordinary highway running between Width of fences, although it may be of a varying and unequal highway. width, the right of passage or way, prima facie and unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers" (1). "All the ground that is between the fences is presumably dedicated as highway, unless the nature of the ground or other circumstances rebut that presumption." But where a road runs over open ground and there are no fences, there is nothing to raise the presumption that any part of the open ground beyond the road actually used has been dedicated as highway (m).—Where a highway had been set out under an Inclosure Act of the width of fifty feet, and twenty-five feet only of the space had been used as a beaten road and the rest had become overgrown with trees and impassable; it was held that the trees were removable as a public nuisance, though when removed they might be the property of the owner of the soil; for that the public

<sup>(</sup>j) Thompson v. Sunderland Gas Co., L. R. 2 Ex. D. 429; 46 L. J. Ex. 610; Normanton Gas Co. v. Pope, 52 L. J. Q. B. 629.
(k) Halsey's Case, Latch. 183; 3 Salk. 183; Rouse v. Bardin, 1 H. Bl. 352; Taunton, J., Simpson v. Lewthwaite, 3 B. & Ad. 233; ante. p. 208 ante, p. 208.

<sup>(</sup>l) Per cur. Queen v. United Kingdom Telegraph Co., 2 B. & S. 647; 31 L. J. M. 166. And see *Harris* v. *Mobbs*, L. R. 3 Ex. D. 268; *Wilkins* v. *Day*, L. R. 12 Q. B. D.

<sup>(</sup>m) Blackburn, J., Easton v. Richmond Highway Board, L. R. 7 Q. B. 75; 41 L. J. M. 25.

rights could not be lost or abandoned over any part of the highway (n). So, where ditches were cut through the strips of grass land at the sides of the made road, being parts of the highway, to the obstruction of persons walking and riding, they were held to be a public nuisance; which could not be justified unless necessarily made for the draining of the road (o).—Encroachments by making any building or fence upon the sides of a highway within fifteen feet of the centre are subject to a special penalty under the Highway Act (p).

Deviation from highway.

At common law if a highway through uninclosed land was impassable for want of repair, the limits of the way being indefinite, the public might pass on the adjacent ground (q). But if a highway was originally dedicated within defined limits, there was no right of deviation extra viam (r). If the limits of a highway were originally undefined the owner of the land might inclose against deviation; but subject to the condition of leaving a sufficient space for the public, and keeping it in such repair as to prevent the excuse for deviation; and he is then chargeable with the repair as long as the inclosure continues (8). But where an ancient highway over open common fields was set out of a certain width by the commissioners under an Inclosure Act, it was held that the allottees who inclosed the adjoining land were not liable to repair, because the highway was defined by the authority of the Act, and not by their inclosures (t).—Where the owner of the soil wrongfully obstructs a highway, the public are justified in deviating over his land, but the original highway is not lost however long the deviation continues; nor does such

<sup>(</sup>n) Turner v. Ringwood Highway Board, L. R. 9 Eq. 418; The King v. Wright, 3 B. & Ad. 681. (o) Nicol v. Beaumont, 53 L. J. C.

<sup>853.</sup> 

<sup>(</sup>p) See Easton v. Richmond Highway Board, supra; post, p. 547.
(q) Absor v. French, 2 Show. 28;
Mansfield, C. J., Taylor v. White-

head, 2 Dougl. 748.

<sup>(</sup>r) The King v. Flecknow, 1 Burr. 461; Arnold v. Holbrook, L. R. 8 Q. B. 96; 42 L. J. Q. B. 80.

<sup>(</sup>s) Duncombe's Case, Cro. Car. 366; The King v. Stoughton, 2 Wms. Saund. 160; Abbott, C. J., Steel v. Prickett, 2 Stark. 468.

<sup>(</sup>t) The King v. Flecknow, 1 Burr. 461.

deviation establish any permanent dedication of the new way, because it is referred to the obstruction for its origin and continuance (u).

The public are entitled to use a highway for passing Public use of and repassing, on foot, or with horses, carts, and cattle, highway. according to the species of highway; any other use of the highway that obstructs the public use of any part of the highway for passing and repassing is a nuisance which may be met by indictment on behalf of the public, or by action at the suit of a person suffering damage, or in some cases by summary proceedings for penalties. It may also be a trespass against the owner of the soil (v).

There is no right at common law in the public to occupy Public any part of a highway for the purpose of holding public meetings. meetings (w). Collecting a crowd and addressing them, whereby part of a highway was obstructed, though the passage by another part was left open, was held to be an offence within the Highway Act, 1835, 5 & 6 Will. IV. c. 50, s. 72, which imposes a penalty upon any person "who shall in any way wilfully obstruct the free passage of any highway" (x). There is no right of holding a public meeting on a common dedicated to the use and recreation of the public under the Metropolitan Commons Act, 1866, 29 & 30 Vict. c. 122; and a bye-law prohibiting the delivery of any public speech or address, except by permission of the proper authority, was held valid (y). There is no general right of holding and addressing public meetings in royal parks, although the public may have been prescriptively licensed to enter and use them for recreation and exercise; and by the Parks Regulation Act, 1872,

<sup>(</sup>u) Absor v. French, 2 Show. 28; The King v. Warde, Cro. Car. 266; Dawes v. Hawkins, 8 C. B. N. S. 848; 29 L. J. C. P. 343. As to deviation from a private way, see ante, p. 209.

<sup>(</sup>v) See ante, p. 491; post, p. 542. (w) See Charles, J., The Queen v.

Graham, 4 Times, L. R. 212; Exparte Lewis, L. R. 21 Q. B. D. 191; 57 L. J. M. 108.

<sup>(</sup>x) Horner v. Cadman, 55 L. J. M. 110; Back v. Holmes, 57 L. J. M. 37.

<sup>(</sup>y) De Morgan v. Metrop. Board, L. R. 5 Q. B. D. 155; 49 L. J. M. 51.

35 & 36 Vict. c. 15, which applies to royal parks under the management of the commissioners of public works, the delivering of a public address, except in accordance with the rules provided by the Act, is made a penal offence (y).

Excessive and extraordinary traffic.

No complaint can be made of nuisance caused merely by the extension or enlargement of lawful traffic; as by an incessant driving of great numbers of cattle in the usual manner (z); or by an increased carrying of stone from quarries in the ordinary carts and loads (a). But carrying an excessive and unusual weight upon a highway is a nuisance indictable at common law (b). By the Highway Act of 1878, 41 & 42 Vict. c. 77, s. 23, special provision is made for the recovery of extraordinary expenses incurred by highway authorities in repairing the highway by reason of damages caused by excessive weights or extraordinary traffic, from any person by whose order such weight or traffic has been conducted (c).—The use of the highway for the modern traffic of locomotive engines is

Locomotives.

Tramways.

regulated by the Locomotive Acts, 1861, 24 & 25 Vict. e. 70; 1865, 28 & 29 Vict. c. 83; and the Highways and Locomotives Act, 1878, 41 & 42 Vict. c. 77 (d).—The use of highways for the construction and working of tramways is regulated by the Tramways Act, 1870, 33 & 34 Vict. e. 78. A tramway laid upon the highway without statutory authority is indictable as a nuisance, though attended with convenience to those of the public who use it: for part of the public are not excused in using the highway for their own convenience in a manner which obstructs it to the rest of the public (e).

Telegraph posts.

Statutory power has been given to telegraph companies

(y) Bailey v. Williamson, L. R. 8 Q. B. D. 118; 42 L. J. M. 49.

(z) See Truman v. London and Brighton Ry., L. R. 11 Ap. Ca. 45; 55 L. J. C. 354.

(a) Wallington v. Hoskins, L. R. 6 Q. B. D. 206; 50 L. J. M. 19.
(b) 3 Salk. 183, Egerly's Case.
(c) Wallington v. Hoskins, supra;
Aveland v. Lucas, L. R. 5 C. P.

D. 211; 49 L. J. C. P. 643; Pool Board v. Gunning, 51 L. J. M. 49.

(d) See The Queen v. Kitchener, L. R. 2 C. C. R. 88; 43 L. J. M. 9; Parkyns v. Preist, L. R. 7 Q. B. D. 313; 50 L. J. M. C. 148.

(e) The Queen v. Train, 2 B. & S. 640; 31 L. J. M. 169; see Bradburn v. Morris, L. R. 3 C. D. 819.

to place and maintain telegraph posts upon any public road with the consent of the road authority (f).—Telegraph posts placed upon a highway without statutory authority, though not placed upon the made road or footpath and though leaving sufficient space for public traffic. were held to be an indictable nuisance; for the public are entitled to the whole space of the highway and to every part of it (g). But telegraph wires carried in the space above the houses are not an infringement of highway rights; which extend only to so much of the surface and space above as is necessary for the public traffic (h).

"Where there is a public highway, the owners of land Special use that comes up to it have a right to go on it, for the pur- by adjacent owner. pose of using it, at any spot from their own land; he who has dedicated the land to all the public has no right to complain that those particular persons have come on it at that spot more than any other" (i). The owner of land Access. adjoining a highway may maintain an action for obstructing the access to and from the highway, and may claim damages or an injunction; and in the case of a public company acting with statutory powers he may claim compensation for his land being injuriously affected by the obstruction of access (j). A public way differs in this respect from a private way, which can be used only for the service of the dominant tenement, and between the prescribed termini (k).—The owner of land adjoining a highway, being therefore presumptively owner also of the soil of the highway subject to the rights of the public, was held entitled to cross the footpath of the highway from

<sup>(</sup>f) Telegraph Acts, 1863 (26 & 27 Vict. c. 112); 1868 (31 & 32 Vict. c. 110).

<sup>(</sup>g) Queen v. United Kingdom Telegraph Co., 2 B. & S. 647; 31 L. J. M. 166.

<sup>(</sup>h) Wandsworth v. United Telegraph Co., L. R. 13 Q. B. D. 904; 53 L. J. Q. B. 449.

<sup>(</sup>i) Blackburn, J., Marshall v. Ulleswater Nav., L. R. 7 Q. B. 166; 41 L. J. Q. B. 45; Cairns, L. C., Lyon v. Fishmongers' Co., L. R. 1 Ap. Ca. 676; 46 L. J. C.

<sup>(</sup>j) Caledonian Ry. v. Walker's Trustees, L. R. 7 Ap. Ca. 259. (k) Ante, p. 208.

the carriage way into his premises with carriages for the conveyance of persons and goods, although he unavoidably damaged the pavement in so doing; for that "the appropriation, made to and adopted by the public, of a part of the street to one kind of passage and another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public"; and that "the provisions of the Highway Acts are subordinate to the paramount rights reserved by the owner" (1). Where a highway together with the adjacent houses had sunk in consequence of the working of mines below the surface, it was held that the highway authority, in exercise of the ordinary duty of repairing the road, was justified in raising it to the original level, though the access to and from the sunken houses was thereby obstructed (m).—But a highway may be originally dedicated to the public with reservation of a fence against adjoining land; so that the owner of the adjoining land would have no right to break through and make a thoroughfare to such highway (n). So, land may be sold with reservation to the vendor of a wall or fence between the land sold and a highway; the purchaser of the land could not then trespass upon the wall to reach the highway; it is immaterial how narrow the strip is by which he is separated, if his land does not "front, adjoin, or abut" upon the highway, he has none of the rights or liabilities of a frontager (o).

Use of highway for service of adjoining premises. The owner of a tenement adjoining a highway is also entitled to make a reasonable use of the highway for the special service of his tenement; as for receiving coals into a cellar through a coal-hole in the pavement; for loading and unloading goods from carriages, and for other like

<sup>(</sup>l) St. Mary, Newington v. Jacobs, L. R. 7 Q. B. 47; 41 L. J. M. 72. See Sellors v. Matlock Board, L. R. 14 Q. B. D. 935.

<sup>(</sup>m) Burgess v. Northwick Local Board, L. R. 6 Q. B. D. 264; 50 L. J. C. P. 219.

<sup>(</sup>n) Woodyer v. Hadden, 5 Taunt. 125.

<sup>(</sup>o) Brewer v. Brown, L. R. 28 C. D. 309; 54 L. J. C. 605; Lightbound v. Bebington, L. R. 14 Q. B. D. 849; 54 L. J. M. C. 130.

temporary obstructions; but subject to legal responsibility for an excess or abuse in the exercise of such right (p). Accordingly, for the tenant of premises on the highway to keep horses and carts standing an unreasonable time upon the highway for the convenience of his private business is an indictable nuisance; and if it causes damage to a neighbour, it is matter for an action or for injunction (q); but it is not such a permanent nuisance as entitles a reversioner of the adjacent land to sue (r).—"So as to repairing a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the party may be indicted for a nuisance" (s). And if a person places building materials upon the highway and thereby obstructs the access to another person's house, and causes loss and inconvenience, he may be charged in an action for special damages (t). A custom of the City of London for any person, having occasion to erect or pull down any building, to erect a hoarding to enclose part of the highway, with the licence of the Lord Mayor, was held a reasonable and valid custom (u).—The occupier of premises adjoining a highway is not entitled to use the sides of the highway for cutting wood (v), and a claim by custom for the inhabitants of a town to stack wood upon the sides of the highway for the use of their houses was held unreasonable and bad (w). The keeping of agricultural implements or other goods upon the sides of the highway until wanted for use is illegal (x); so, the keeping of public vehicles standing upon the highway waiting for

(p) Per cur. The Queen v. Longton Gas Co., 29 L. J. M. 118.
(q) The King v. Russell, 6 East, 427; Benjamin v. Storr, L. R. 9 C. P. 400; 43 L. J. C. P. 162.
(r) Mott v. Shoolbred, L. R. 20 Eq. 22; 44 L. J. C. 380.
(s) Ellenborough, C.J., The King v. Jones, 3 Camp. 231.
(t) Bush v. Steinman, 1 B. & P.

<sup>404;</sup> Fritz v. Hobson, L. R. 14 C. D. 542; 49 L. J. C. 321.
(u) Bradbee v. Christ's Hospital, 4 M. & G. 714.
(v) The King v. Jones, 3 Camp. 230.

<sup>(</sup>w) Fowler v. Sanders, Cro. Jac. 446.
(x) Wilkins v. Day, L. R. 12

Q. B. D. 110.

passengers an unreasonable time (y); and the keeping by an innkeeper of the carriages of his guests upon the highway (z).—The occupier of a house cannot enter upon and open the soil of the adjoining highway for the purpose of laying down service pipes for gas or water, without statutory authority, even with consent of the owner of the soil (a); nor can be open the soil to make an entrance to cellars under the highway; where such openings exist they are presumedly made before the dedication of the highway, or under a local custom (b).

Use of public river by riparian owner.

Upon the same principle a riparian owner upon a public navigable river, being a highway, has a special and exclusive right of access to and from his land, besides his right of navigation in common with the rest of the public (c); and this right is protected by an action for damages, or for an injunction, or by a claim for compensation (d). He has also the right of mooring vessels opposite his premises for the loading and unloading of goods, subject to the public rights of navigation and the like rights of his neighbours; and for this purpose he is not restricted to the space opposite his own premises, but may moor a vessel, being of an ordinary size and kind, which extends in length beyond his own premises (e). So, a dock owner is entitled to access for vessels from a public river through his dock gates at all reasonable times; but he has no right to place a permanent obstruction opposite his dock gates for the purpose of preventing other vessels mooring there (f).

(y) The King v. Cross, 3 Camp.

(z) Gerring v. Barfield, 16 C. B. N. S. 597.

(a) The Queen v. Longton Gas Co., 29 L. J. M. 118; Goodson v. Richardson, L. R. 9 Ch. 221; 43 L. J.

C. 790; ante, p. 491.
(b) Per cur. The Queen v. Longton

Gas Co., supra.

(c) Rose v. Groves, 5 M. & G. 613; Att.-Gen. v. Thames Conserv., 1 H. & M. 1; Marshall v. Ulleswater Nav.,

L. R. 7 Q. B. 166; 41 L. J. Q. B. 41; Bell v. Quebec, L. R. 5 Ap. Ca. 84; see Att. Gen. Straits Settlement v. Wemyss, L. R. 13 Ap. Ca. 192; 57 L. J. P. C. 62; and see ante, p.

(d) Lyon v. Fishmongers' Co., L. R. 1 Ap. Ca. 662; 46 L. J. C. 68. (e) Original Hartlepool Coll. v. Gibb, L. R. 5 C. D. 713; 46 L. J.

C. 311.

(f) Original Hartlepool Coll. v. Gibb, supra.

There is no obligation upon the owner of adjoining land Fencing land to fence against the highway; he presumptively does so highway. only for his own protection and convenience. If cattle being driven along the highway lawfully and in a proper manner stray on to the adjoining land through defects in a fence without any negligence of the driver, and eat the grass or crops there growing, the owner of the cattle is excused the trespass; but he is bound to remove the cattle as soon as it is reasonably possible to do so under the circumstances (g). If cattle being on the highway without lawful excuse, that is, for any other purpose than a lawful use of the highway for passage to and fro, stray on to the adjoining land, though through a defect of the fence, the trespass is not excused. "The question whether the owner of the cattle is a trespasser or not, by his cattle, depends upon the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers" (h). The same rule applies whether the highway is through open unfenced fields or through the streets of a town; so where an ox being driven in a usual and proper manner through a town, strayed into an open shop, and there did damage to the goods, it was held that, no negligence being proved against the driver, the owner of the ox was not liable for the trespass and damage done (i).—A person suffering his cattle to stray off his own land on to the highway through defect of his fence or otherwise, is liable to compensate for all damage caused by his cattle being unlawfully upon the highway; nor can he recover for any injury they may meet with as trespassers. But railway companies are bound by statute to fence their lines against cattle of the adjoining owners, and therefore cattle straying upon the

<sup>(</sup>g) Dovaston v. Payne, 2 H. Bl. 527; 2 Smith, L. C.; Goodwyn v. Cheveley, 4 H. & N. 631; 28 L. J. Ex. 298.

<sup>(</sup>h) Dovaston v. Payne, supra. (i) Tillett v. Ward, L. R. 10 Q. B. D. 17; 52 L. J. Q. B. 61.

line through defect of fences are not considered to be wrongfully upon the line as against the company and their servants (j). And in the case of level crossings of railways, the statutory obligation to keep the gates closed is absolute against all persons or cattle, whether lawfully using the highway or not; and the owner of the cattle straying upon the line from the highway through open or defective gates may recover for their loss (k).

Fencing nuisance adjoining highway.

The owner of land adjoining a highway who makes an excavation, or causes any other kind of danger, so near to the highway as to constitute a public nuisance, is bound to fence it against persons using the highway, at the risk of liability for all damage occasioned by the nuisance; and he who continues such danger is as responsible as he who originally caused it. Except under such special circumstances, an owner of land is under no obligation to fence excavations or dangers upon his own land as against strangers; though he may become liable for negligence in respect of the state of his premises towards persons coming there by leave, or on business (l).

<sup>(</sup>j) Child v. Hearn, L. R. 9 Ex. 176; 43 L. J. Ex. 100; Sharrod v. London & N. W. Ry., 4 Ex. 580; 20 L. J. Ex. 185; ante, p. 260. (k) Fawcett v. York & Midland Ry., 16 Q. B. 610; 20 L. J. Q. B. 222; see Charman v. South Eastern Ry., W. N., 1888, p. 182; ante, p. 262.

<sup>(</sup>l) Coupland v. Hardingham, 3 Camp. 398; Barnes v. Ward, 9 C. B. 392; Hadley v. Taylor, L. R. 1 C. P. 53; Hounsell v. Smyth, 7 C. B. N. S. 731; see Corley v. Hill, 4 C. B. N. S. 556; Indermaur v. Dames, L. R. 2 C. P. 311; 36 L. J. C. P. 181; White v. France, L. R. 2 C. P. D. 308; 46 L. J. C. P. 823.

## § 2. Origin and Extinction of Highways.

Origin of highways-highways by statute.

Dedication of highway-dedication by act of owner-dedication presumed from public use-presumption rebutted.

Dedication by owner in fee-by reversioner-presumption of title to dedicate -dedication by corporate body.

Acceptance of dedication by public—adoption by parish.

Dedication for limited time -to limited public-for limited use.

Dedication subject to obstructions—gates—ploughing—markets and fairs-public way subject to private way.

Highway subject to tolls-toll thorough-toll traverse-toll of ferry and other tolls-prescription for toll on highway-exemptions from toll-distress for toll-rating of toll.

Extinction of highway-stopping and diverting highways at common law-by statutes-destruction of way.

Highways may be referred to two origins: the legisla-Origin of tive authority of an Act of Parliament; and dedication by highways. the owner of the land. A highway may be established by immemorial prescription at common law; but by reason of the doctrine, noticed hereafter, that public use is evidence of dedication, "it is never practically necessary to rely on prescription" (a).—In pleading a public highway it is sufficient to allege that it is a public highway, without stating the origin, whether statutory or prescriptive, and without stating any termini or limits (b).

Turnpike Acts and railway Acts are familiar instances Highways by of statutes creating public ways. Powers of setting out statute. highways are also given in inclosure Acts, in order to adapt the public ways to the altered conditions of the inclosures (c).—It is not necessary that a statute in creating a

As to pleading private ways, see

<sup>(</sup>a) L. Blackburn, Mann v. Brodie, L. R. 10 Ap. Ca. 386; Brett, J., Cubitt v. Maxse, L. R. 8 C. P. 714; 42 L. J. C. P. 278.

<sup>(</sup>b) Aspindall v. Brown, 3 T. R. 265; but see Spedding v. Fitzpatrick, L. R. 38 C. D. 410, post, p. 505.

ante, p. 208.
(c) Inclosure Clauses Consolidation Act (41 Geo. III., c. 109), s. 8; General Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 34.

highway should in express terms declare the way to be a public highway; it is sufficient if it gives a public right to use the way for the purpose of passage; the right of public use makes it a highway, and all the legal incidents of a highway follow (d). And the intrinsic force of the statute is sufficient alone to make a public highway according to its terms, without any condition of acceptance by the public; which is necessary to establish a highway by dedication (e).—The provisions of a statute creating a public highway must be strictly followed; and upon this principle it was held that if an Act be passed for making a public road between two places, the making of the entire road is presumptively a condition precedent to any part becoming a highway, at least for the purpose of charging the parish with repair; but the Act may give a discretion as to completing the road, and as to opening it to the public so far as it is made (f). The Inclosure Clauses Consolidation Act, 41 Geo. III. c. 109, ss. 8, 9, which provide for the setting out of roads and the putting of them in complete repair, is construed as making complete repair a condition precedent of a road becoming public; and it is held that merely setting out a road under the Act is not sufficient to make it a highway (g).

Dedication of highway.

By act of owner.

A highway may also be created by dedication of the way to the public use, and acceptance of the way by the The dedication may be proved by some act of the owner of the land, or by public use from which such act can be presumed. No formality or conveyance is required by law for the dedication by the owner of the land; it is sufficient that it is evidenced by some unequivocal act, or

(f) The King v. Cumberworth, 3 B. & Ad. 108; The King v. Edge Lane, 4 A. & E. 723; The Queen v. French, L. R. 4 Q. B. D. 507; 48 L. J. M. 175.

<sup>(</sup>d) Campbell, C. J., The Queen v. Lordsmere, 15 Q. B. 696. (e) The King v. Lyon, 5 D. & R. 497; see Cubitt v. Marse, L. R. 8 C. P. 704; 42 L. J. C. P. 278,

post, p. 508.

<sup>(</sup>g) Cubitt v. Masse, L. R. 8 C. P. 704; 42 L. J. C. P. 278.

agreement, or declaration of intention. But if a party to an action in which a highway is in question relies on any specific acts of dedication or specific declarations of intention to dedicate, whether alone or jointly with evidence of public use, he may be required to give particulars of the nature and dates of the said acts or declarations, and the names of the persons by whom the same were done or  $\operatorname{made}(h)$ .—"If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public" (i). So if the owner of the soil closes an ancient way and opens a new one, it is presumptively a dedication of the new way; though the public by using it are not precluded from claiming the original way, unless it has been legally stopped (j). An agreement by the owner of the land to dedicate a public way may operate eventually as a dedication, if it be duly completed, and the way be adopted and accepted by the public; but the agreement may fail of execution from various causes before the dedication is complete (k).—"If there be an unequivocal act of dedication, it may take place immediately. For instance if a man builds a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway" (l).

The fact of the public use of a way is presumptive Dedication evidence of a dedication to the public by the owner of the presumed from public soil; and it lies on the party disputing the dedication to use. show a superior title, or to explain the public use in a manner to rebut the presumptive effect (m). The public

<sup>(</sup>h) Spedding v. Fitzpatrick, L. R. 38 C. D. 410.
(i) L. Ellenborough, C.J., The King v. Lloyd, 1 Camp. 262.
(j) See Dawes v. Hawkins, 8 C. B. N. S. 848; 29 L. J. C. P. 343; Allnutt v. Pott, 1 B. & Ad. 302.
(k) Allnutt v. Pott, 1 B. & Ad.

<sup>302;</sup> Barraclough v. Johnson, 8 A. & 502, Barraciough V. Joinson, 8 A. & E. 99; Healey v. Batley, L. R. 19 Eq. 375; 44 L. J. C. 642; see Att. Gen. v. Biphosphate Co., L. R. 11 C. D. 341; 49 L. J. C. 68.

(l) Chambre, J., Woodyer v. Hadden, 5 Taunt. 137.

<sup>(</sup>m) Jarvis v. Dean, 3 Bing. 447;

use required to raise the presumption must be certain and definite as to the place and direction, the time and extent of the use, the persons using, and all other matters necessary to constitute a highway (n). The duration of the public use which may be necessary depends upon the locality and the circumstances, no definite space of time being prescribed by law; but in all such cases the time is a material ingredient in aid of the presumed dedication (o). A way originally set out as a private way, to be used and repaired by certain persons only, may become a highway by public user sufficiently established, notwithstanding the difficulty of distinguishing the public use and preventing it (p).

Presumption rebutted.

The presumption may be rebutted by showing that the way was used by the public not as of right, but by particular license or sufferance of the owner, or as a mere occasional trespass from a public way for sake of convenience (q); or by showing that it was referable to some express agreement operating only as a temporary or conditional license which was revocable under the circumstances, or which expired according to its terms (r). The presumption cannot be rebutted by a mere verbal declaration of the intention of the owner to the contrary, without any actual interruption or obstruction of the public use; but the public use of a way being only presumptive evidence of the dedication, a single act of interruption by the owner is of more weight than many acts of enjoyment by the public (s). Accordingly the erection of a gate or

The Queen v. Petrie, 4 E. & B. 737; 24 L. J. Q. B. 165.

24 L. J. Q. B. 165.
(n) Per cur. Att.-Gen. v. Biphosphate Co., L. R. 11 C. D. 341; 49 L. J. C. 73; Maddock v. Wallasey Board, 55 L. J. Q. B. 267.
(o) Gibbs, J., Woodyer v. Hadden, 5 Taunt. 135; Rugby Charity Trustees v. Merryweather, 11 East, 376 n.; L. Blackburn, Mann v. Brodie, L. R. 10 Ap. Ca. 386. According to Scotch law there is a fixed period of forty vers required fixed period of forty years required

to establish a public way by prescription; and such way may be lost by a period of forty years exclusion of the public; Mann v.

Brodie, supra.

(p) The Queen v. Bradfield, L. R. 9 Q. B. 552; 43 L. J. M. 155. (q) Maddock v. Wallasey Board, 55 L. J. Q. B. 267.

(r) Barraclough v. Johnson, 8 A. & E. 99; The King v. Hudson, 2 Strange, 909, ante, p. 505.
(s) Littledale, J., Barraclough v.

obstacle across the way, though soon after knocked down, was held sufficient to rebut the intention of dedication (t).

Dedication of a public way can only be made by an Dedication by absolute owner in fee simple. "Nothing done by a lessee. owner in fee; without the consent of the owner of the fee, would give the right of way to the public." Accordingly, where the land had been held under a lease for ninety-nine years, during which the public had used a way, and at the expiration of the lease the reversioner entered and erected a fence; it was held that, there being no evidence of a dedication before the lease, or of the consent of the reversioner during the lease, the public had acquired no right, and he was entitled to stop the way (u). For the use of the way during the lease, being presumptively no injury to the reversion, and therefore not actionable at the suit of the reversioner, was no evidence of right against him (v).—A by reverconsent and dedication by the reversioner may, however, sioner. be presumed from the particular circumstances of the case, and it is said that "after a long lapse of time and a frequent change of tenants, from the notorious and uninterrupted use of a way by the public, it should be presumed that the landlord had notice of the way being used, and that it was so used with his concurrence"; and notice to the steward or agent of the property is for such purpose notice to the landlord (w). In the case of copyhold land the public use of a way is presumptive evidence of dedication against the lord of the manor, without proof of his ever having been in possession of the tenement (x).

Public use presumes a dedication by an owner having Presumption title to make it, and prima facie dispenses with any inquiry of title to dedicate.

Johnson, 8 A. & E. 105; Parke, B., Poole v. Huskisson, 11 M. & W. 830. (t) Roberts v. Karr, 1 Camp. 262, n. (b); Healey v. Batley, L. R. 19 Eq. 388; 44 L. J. C. 642. (u) Wood v. Veal, 5 B. & Ald. (v) Baxter v. Taylor, 4 B. & Ad.

(w) Ellenborough, C.J., The King v. Barr, 4 Camp. 16; Jarvis v. Dean, 3 Bing. 447. (x) Powers v. Bathurst, 49 L. J. C. 294.

into the title or act of dedication; but the presumption may be rebutted by showing that no such owner in fact existed as could, or did make the presumed dedication. And as the dedication must have been coeval with the public use, it is sufficient that a title could then have existed to support the dedication, and such a title will then be presumed, although it may appear that subsequent owners had no such power, or did not acquiesce in the dedication (y). If by reason of the uncertainty as to any other ownership the title may be presumedly vested in the Crown, the public use may establish a dedication against the Dedication by Crown (z).—A corporate body or public company holding land for the purposes of their undertaking may dedicate a public highway, provided such use of the land is not inconsistent with the act or object of their incorporation; and with that restriction a dedication may be presumed against them from public use (a). Thus a canal company was held capable of dedicating a public carriage way over a bridge of the canal and of dedicating a public footway along a towing path of the canal, subject to the use of the bridge and towing path for the purposes of the canal; and such dedications may be justly presumed from long public use (b).

corporate body.

Acceptance of dedication by public.

Adoption by parisb.

"It is not compulsory on the public to accept the use of a way when offered to them; but both dedication by the owner and acceptance by the public must concur to create a highway, otherwise than by statute. Acceptance by the public is ordinarily proved by user by the public; and user by the public is also evidence of dedication by the owner" (c).—Repair of the road by the parish is evidence of acceptance by the public, but not conclusive; because the parish, though bound to repair, if the public at large

<sup>(</sup>y) The Queen v. East Mark, 11 Q. B. 877; The Queen v. Petrie, 4 E. & B. 737; 24 L. J. Q. B. 165. (z) Turner v. Walsh, L. R. 6 Ap. Ca. 636; 50 L. J. P. C. 55. (a) The King v. Leake, 5 B. & Ad. 469.

<sup>(</sup>b) Grand Surrey Canal Co. v. Hall, 1 M. & G. 392; Grand June tion Canal Co. v. Petty, L. R. 21 Q. B. D. 273; 57 L. J. Q. B. 572. See Mulliner v. Midland Ry., L. R. 11 C. D. 611; 48 L. J. C. 258. (c) Brett, J., Cubitt v. Maxse,

accept the road, is only part of the public for the purpose of acceptance. "If the road has been used by people in the parish, it furnishes evidence pro tanto of its being a way for the rest of the public, and if the parish have repaired it, it furnishes a strong inference that it is a public highway; but it only raises a strong presumption, and there is no estoppel against a parish in such a case; the adoption by the parish does not necessarily as a matter of law make a road public, nor does their refusal to adopt it prevent its being so "(d).

"There can be no dedication of a way to the public for Dedication for a limited time, certain or uncertain. If dedicated at all, it limited time. must be dedicated in perpetuity." The dedication is an irrevocable licence to the public to use the way (e). Dedication by the lessee of a term would operate as a licence during the term, as against himself and his assignees; but it would not create a public way as regards the charge of repair and other legal incidents (f).—An Act of Parliament may create a highway for a limited time, as was generally the practice with Turnpike Acts, which were limited in their operation to a term of years, and then renewed from time to time. In such case the highway has by statute during the term all the legal incidents of a highway, as to the rights of the public and obligation to repair; but it is not a permanent highway, except by continual renewal of the Act of constitution (g). The use and repair of the road during the term will not serve as evidence of a permanent dedication or acceptance, because they are referable to and explained by the provisions of the Act(h).

L. R. 8 C. P. 704; 42 L. J. C. P. 278. Per cur. Att.-Gen. v. Bi-phosphate Co., L. R. 11 C. D. 340; 49 L. J. C. 68.

<sup>(</sup>d) Littledale, J., The King v. Leake, 5 B. & Ad. 484; Roberts v.

Hunt, 15 Q. B. 17.

(e) Byles, J., Dawes v. Hawkins, 8 C. B. N. S. 858; 29 L. J. C. P.

<sup>(</sup>f) Att.-Gen. v. Biphosphate Co., L. R. 11 C. D. 338; 49 L. J. C.

<sup>(</sup>g) The Queen v. Lordsnere, 15 Q. B. 689; 19 L. J. M. 215; The King v. Winter, 8 B. & C. 792.

<sup>(</sup>h) The King v. Mellor, 1 B. & Ad. 32.

There cannot be a dedication to a limited part of the

Dedication to limited public.

For limited use.

public, with the effect of creating a public way so limited; it would operate as a licence only, without the legal incidents of a public way; and upon this principle a dedication to a parish is not a dedication to the public, the parish being only a part of the public (i). A limited part of the public, as a parish, may have a right of way by custom; which is a prescriptive title founded upon immemorial use and enjoyment in the particular place with which such part of the public are identified (j).— There may be a dedication of a highway to the public for a limited use, as for a foot-way, or for a bridle-way. There may also be a dedication of a general highway, with the exception of a particular use, as the carriage of coals. In such cases "the public must take the way secundum formam doni; if they cannot take according to that, they cannot take at all." The right given cannot be more extensive than the gift imports (k). And there may be a dedication limited to occasional use, as a bridge for the use of the public only in times of flood, when an adjoining ford is dangerous, and to be closed at all other times (1). So the public may acquire the right to pass over land adjoining the sea shore, when the tide prevents

Dedication subject to

obstructions.

The dedication of a way may be made subject to obstructions and incumbrances existing in the original construction; as in the case of a new street in which there may be projecting door steps, cellar doors, coal holes, and the like; and if obstructions have existed beyond living memory, they may be presumed to be coeval with the street and with the original dedication. Any such obstructions erected after the dedication of the way become

the use of a public way along the shore (m).

<sup>(</sup>i) Poole v. Huskisson, 11 M. & W. 827; ante, p. 509.

 <sup>(</sup>j) See post, p. 549.
 (k) Stafford v. Coyney, 7 B. & C. 257.

<sup>(1)</sup> The King v. Buckingham, 4 Camp. 189; The King v. Northamp-ton, 2 M. & S. 262. (m) See Maddock v. Wallasey Board, 55 L. J. Q. B. 267.

nuisances, and those who placed them, or who afterwards maintain them there are responsible for the consequences (n). -Thus, a public way may be dedicated subject to the gates Gates and and stiles existing upon it; which, if erected upon a previously existing highway, would be indictable (o). The right of placing works upon the highway, which may prove obstructions, is in some cases given by statute, as the fire-plugs connected with waterworks, under Waterworks Acts; trap doors connected with public sewers and the like (p).—A way over land may be subject to the Ploughing. occupier ploughing up the beaten track whenever ploughing is necessary for the cultivation of the land; and where it appeared that as far back as living memory went a footpath across a field had been so ploughed up, it was held that the proper inference was that the original dedication of the field had been made subject to the right of ploughing (q). When the dedication is thus qualified the public have no right of deviation from the prescribed line of way upon the occasions of the ploughing (r). A way may be dedicated subject to the owner of the land pasturing cattle over it (s).—A highway may by imme- Markets and morial custom be subject to the holding of a market or fairs. fair upon certain days, leaving sufficient space for public passage (t). And a way may be dedicated subject to the right of the adjacent occupiers to place goods and exercise their business upon the spaces in front of their tene-

<sup>(</sup>n) Per cur. The Queen v. Longton Gas Co., 29 L. J. M. 123: Fisher V. Provse, Cooper v. Walker, 2 B. & S. 770; 31 L. J. Q. B. 212. See Sandford v. Clarke, L. R. 21 Q. B.

D. 398, post, p. 545.
(o) James v. Hayward, Cro. Car.
184; Bateman v. Burge, 6 C. & P.
391. As to the width of gates
across public cartways and horseways, see 5 & 6 Will. 4, c. 50, s. 81.

(p) Moore v. Lambeth Waterworks,
55 L. J. Q. B. 304.

<sup>(</sup>q) Mercer v. Woodgate, L. R. 5 Q. B. 26; 39 L. J. M. 21;

Arnold v. Blaker, L. R. 6 Q. B. 433; 40 L. J. Q. B. 185.

<sup>(</sup>r) Arnold v. Holbrook, L. R. 8 Q. B. 96; 42 L. J. Q. B. 80. See ante, p. 494.

ante, p. 494.
(s) Coverdale v. Charlton, L. R. 4
Q. B. D. 104; 47 L. J. Q. B. 446.
(t) Elwood v. Bullock, 6 Q. B. 383;
Att.-Gen. v. Horner, 55 L. J. Q. B.
193; L. R. 11 Ap. Ca. 66; Horner
v. Whitechapel, 55 L. J. C. 289. By
the Fairs Act, 1871 (34 & 35 Vict.
c. 12), power is given to abolish fairs.

ments (u); but such a right cannot be prescriptively acquired after the original right of way (v).

Public way subject to private way.

A public way may be dedicated subject to a private way over the same ground; as a public footway over a private road for carriages, where the use of carriages would be primâ facie a nuisance to the foot passengers. In such case the private way must have preceded the public right, or at least must have been contemporary with it; because no private right could have been acquired by grant or prescription in derogation of the public right. owner of the servient tenement could not dedicate absolutely to the public so long as it remained subject to the prior right; he could give nothing but what he himself had, a right of user not inconsistent with the private easement" (w). A private way may become presumptively dedicated also as a public way by evidence of public use, and as such it would be repairable by the parish; but the subsequent dedication does not merge the private way, nor the special remedies appropriate to it (x).

Highway subject to toll.

The right of taking toll from the public is a franchise emanating from the prerogative of the Crown, and may be vested in a subject by charter or royal grant, or by immemorial prescription, which imports such grant. It may also be created by statute, as in modern times by Turnpike Acts, which create highways subject to the condition of toll, but attended with the legal incidents of a public highway at common law (y). Toll upon a highway is distinguished at common law as being toll thorough or toll traverse. Toll thorough, which generally occurs in some town or borough, is a toll granted in consideration of

Toll thorough.

<sup>(</sup>u) Le Neve v. Mile End, 8 E. & B. 1054; 27 L. J. Q. B. 208; Morant v. Chamberlain, 6 H. & N. 541; 30 L. J. Ex. 299.

<sup>(</sup>v) Fowler v. Sanders, Cro. Jac.

<sup>(</sup>w) Per cur. The Queen v. Chorley, 12 Q. B. 520; Grand Surrey Canal v. Hall, 1 M. & G. 392;

Brownlow v. Tomlinson, 1 M. & G. 484.

<sup>(</sup>x) Allen v. Ormond, 8 East, 4; Patteson, J., Duncan v. Louch, 6 Q. B. 915; The Queen v. Bradfield, L. R. 9 Q. B. 552; 43 L. J. M. 155.

 <sup>(</sup>y) The Queen v. Lordsmere, 15
 Q. B. 689; 19 L. J. M. 215.

doing some service of public benefit upon the highway, as repairing the road, or maintaining a bridge or a ferry; it cannot be imposed without some beneficial consideration commensurate with the toll (z). Accordingly, a claim of toll to be taken throughout all parts of a town cannot be supported upon the consideration of repairing only some of the streets of the town; toll can be claimed for passage over those streets only which there is the duty to repair (a).

Toll traverse is a toll granted in consideration only of Toll traverse. a public way over the land of the grantee; the way being dedicated to the public subject to the toll, in consideration of the grant of the toll to the owner of the land; for no man can take a toll, as such, even in his own land for a public way without the licence of the Crown; and if he accepts a charter to take toll for a way over his land, he impliedly dedicates the way to the public (b). It seems therefore that, except under such charter, a person cannot dedicate a way subject to toll; the dedication would amount merely to a licence to use the way from time to time in consideration of paying the toll, and would be revocable at any time (c). — Hence in claiming a toll thorough a sufficient continuing consideration must be alleged and proved; but "a toll traverse is said to differ from a toll thorough in this, that no consideration for it need be averred. This does not, however, mean that there need be no consideration for it; it merely expresses that, as there can be no toll traverse except in respect of going over the land of the grantee, the consideration of using the land is implied from the character of the toll, and need not be further averred than by stating it is a toll traverse "(d).

<sup>(</sup>z) Nottingham v. Lambert,

<sup>(</sup>z) Nottingham V. Lambert, Willes, 111.
(a) Truman v. Walgham, 2 Wils. 296; Hill v. Smith, 4 Taunt. 520; Brett v. Beales, 10 B. & C. 508; Brecon Markets Co. v. Neath Ry, L. R. 8 C. P. 157; 42 L. J. C. P. 63.
(b) Hale de Jure Maris, Har-

grave's Tracts, p. 10. See Rickards v. Bennett, 1 B. & C. 223.

<sup>(</sup>c) Austerberry v. Oldham, L. R. 29 C. D. 750; 55 L. J. C. 633. (d) Per cur. Breeon Markets Co. v. Neath and Brecon Ry., L. R. 7 C. P. 566; 41 L. J. C. P. 257; James v. Johnson, 2 Mod. 143.

Toll of ferry and other tolls.

A ferry is a franchise analogous to toll thorough, giving a right to take toll for conveying passengers and goods across a river, in consideration of the duty of providing and maintaining the means of conveyance; and "no man may set up a common ferry for all passengers, without a prescription time out of mind or a charter from the king" (e). A similar toll may be granted for pontage, or the maintenance of a bridge (f). Tolls analogous to toll traverse may be claimed for the use of land for various other purposes; as for landing goods at a wharf (g); or for bringing and delivering goods in a town (h); or for ships entering and using a port (i); the claim of toll in all such cases having originated in the ownership of the land, and the dedication of it to public use. Such tolls may be appurtenant to a manor, and pass with a conveyance of the manor (i).

Prescription for toll on highway. Where a highway has originally existed free of toll, no toll can be subsequently imposed without a sufficient consideration, as of repairing the road or a bridge. Hence "a man cannot prescribe to have toll for passing in the king's highway, for that it is the inheritance of every man to pass on the king's highway, which is prior to all prescriptions; and therefore if a man will plead such a prescription he must show a reasonable cause for its commencement, which is not to be presumed" (k). But a toll traverse, originally well created, may subsequently be dissevered from the title to the land; and where a toll had been taken from time immemorial without any apparent consideration beyond the use of the highway, and the toll

<sup>(</sup>e) Hale de Jure Maris, Hargrave's Tracts, p. 6; Payne v. Partridge, 1 Show. 231; S. C. Pain v. Patrick, 3 Mod. 289; Blisset v. Hart, Willes, 512 (a); Peter v. Kendal, 6 B. & C. 703; Trotter v. Harris, 2 Y. & J. 285.

<sup>(</sup>f) 2 Co. Inst. 701; Nicholl v. Allen, 1 B. & S. 916; 31 L. J. Q. B. 283.

<sup>(</sup>g) Crispe v. Belwood, 3 Lev.

<sup>422;</sup> Colton v. Smith, 1 Cowp. 47.
(h) Rickards v. Bennett, 1 B. & C. 223.

<sup>(</sup>i) Yarmouth v. Eaton, 3 Burr. 1402; The Queen v. Durham, 28 L. J. M. 232; Exeter v. Warren, 5 Q. B. 773.

<sup>(</sup>j) James v. Johnson, 2 Mod. 144. (k) Nottingham v. Lambert, Willes, 111; see Smith v. Shepherd, Cro. Eliz. 710.

and the land had been originally vested in the same person, though since severed; it was held to be rightly presumed, in favour of a legal origin, that the toll had been granted in consideration of the original dedication of the highway, and therefore might be claimed as a toll traverse (l).

A grant may be made of toll, with exemption of a cer- Exemption tain part of the public; as the toll upon corn imported from foll. into the City of London, with exemption of freemen of the city (m). Such exemption may be proved by immemorial custom; as a custom for the inhabitants of a town to pass a ferry toll free (n).—There are also statutory exemptions from toll on turnpike roads applied to certain persons and upon certain occasions, namely, the Queen and the Royal family, the military forces, the police, ministers and persons attending church on Sundays, and funerals, horses, carts and implements of husbandry, agricultural manures and produce, the carriage of materials for repair of roads and bridges, county elections, and various other matters (o). Also, no tolls can be demanded or taken for any horse, or beast, or cattle of any kind, or for any carriage of any kind, "which shall only cross any turnpike road or shall not pass above one hundred yards thereon "(p).

A prescriptive right to toll may be attended with a pre- Distress for scriptive right to seize goods subject to toll upon the highway, as a distress to recover the toll (q). The General Turnpike Act, 3 Geo. IV. c. 126, s. 39, gives power to seize and distrain any horse, cattle, carriage, or other thing upon which toll is imposed, or any of the goods or chattels

<sup>(</sup>l) Pelham v. Pickersgill, 1 T. R. 660; Rickards v. Bennett, I B. & C.

<sup>(</sup>m) Cocksedge v. Fanshaw, Dougl. 119; Lord Blackburn, Goodman v. Saltash, L. R. 7 Ap. Ca. 657; see Middleton v. Lambert, 1 A. & E. 401. (n) Payne v. Partridge, 1 Shower,

<sup>231;</sup> S. C. Pain v. Patrick, 3 Mod.

<sup>289.</sup> See Lockwood v. Wood, 6 Q.

<sup>(</sup>o) 3 Geo. 4, c. 126, ss. 26 -32. (p) 3 Geo. 4, c. 126, s. 32; 4 & 5 Vict. c. 33; Bussey v. Storey, 4 B. & Ad. 109.

<sup>(</sup>q) Smith v. Shepherd, Cro. Eliz. 710.

of the person refusing to pay the toll; with power to sell the things so seized and distrained. Tolls may also be recovered as a debt, by action (r).

Rating of tolls.

Tolls in general are not rateable, unless taken as profits of the occupation of land. "Under the Statute of Elizabeth (43 Eliz. c. 2, for the relief of the poor) the owner of tolls per se is not rateable. Tolls to be rateable must be connected with the occupation of land, so as to be considered as increasing the value of the land "(s). — Hence toll traverse, being taken in consideration of the use of the land, presumptively implies the occupation of the land and is rateable. Accordingly a toll traverse taken on a bridge was held rateable as being a profit of the occupation of the bridge, and repairs done by the owner of the toll were held to be referable to his ownership of the bridge, and not merely to an obligation in consideration of the toll (t). Toll thorough, which is taken in respect merely of repair of the road or other beneficial service, imports no occupation of the land, and is not rateable (u). So, the toll of a ferry is not, in general, rateable (v). The tolls of turnpike roads were expressly exempted from rating to any public, or parochial rate by the General Turnpike Act, 3 Geo. IV. c. 126, s. 51.

Extinction of highways.

"It is an established maxim, once a highway always a highway; for the public cannot release their rights, and there is no extinctive presumption or prescription from disuser"; nor can a prescriptive claim of any kind arise against a highway from adverse use or occupation (w).

Stopping and

The mode of legally stopping or diverting a highway at

<sup>(</sup>r) Seward v. Baker, 1 T. R. 616. (s) Coleridge, J., Lewis v. Swansea, 5 E. & B. 508; 25 L. J. M. 37; see ante, p. 487.

<sup>(</sup>t) The Queen v. Salisbury, 8 A. & E. 716.

<sup>(</sup>u) The King v. Eyre, 12 East, 416; The King v. Barnes, 1 B. & Ad. 113.

<sup>(</sup>v) The King v. Nicholson, 12 East, 330; The Queen v. North & S. Shields Ferry, 1 E. & B. 140; 22 L. J. M. 9.

<sup>(</sup>w) Byles, J., Dawes v. Hawkins, 8 C. B. N. S. 858; 29 L. J. C. P. 343; Vooght v. Winch, 2 B. & Ald. 662; Turner v. Ringwood Board, L. R. 9 Eq. 418, ante, p. 494.

common law was by the writ of ad quod damnum, which diverting was an original writ issuing out of and returnable into highway, at common law. Chancery, directing the sheriff to inquire by a jury whether the proposed stoppage or diversion would be detrimental to the public. Upon a return to the writ that no detriment would accrue, the crown might grant a licence to stop or divert the way. But the return was traversable at Quarter Sessions; and it was no bar to an indictment for a nuisance (x). A new way opened in place of a way stopped under a writ of ad quod damnum became forthwith a public highway (y). Proceedings under this writ have long since fallen into disuse, being superseded by the more efficient procedure by statute.

A highway may now be diverted and turned, or it may By statutes. be entirely or partially stopped, by an order of Quarter Sessions, founded upon a certificate of justices, certifying either that the proposed new highway is nearer or more commodious to the public, or that the highway proposed to be stopped is unnecessary; the proceedings being taken under the General Highway Act (z).—Also by the Highways Act, 1878, 41 & 42 Vict. c. 77, s. 24, a highway authority may apply to the Court of summary jurisdiction of the petty sessional division in which a highway is situate for an order "declaring such highway unnecessary for public use, and that it ought not to be repaired at the public expense." And if the Court make such order, "the expenses of repairing such highway shall cease to be defrayed out of any public rate" (a).—By the General Inclosure Act, 1845, 8 & 9 Vict. c. 118, s. 62, power is given "to set out and make public roads and ways, in and over the land to be inclosed, and stop up, divert, or alter any of the roads or ways passing through the land to be inclosed, or through any old inclosures in the parish in

<sup>(</sup>x) The King v. Warde, Cro. Car. 266; Ex parte Vennor, 3 Atk. 766; Tenterden, C. J., The King v. Russell, 6 B. & C. 599.

<sup>(</sup>y) Hale de J. Maris, Hargr.

Tracts, p. 10. See ante, p. 505. (z) 5 & 6 Will. 4, c. 50, ss. 84

<sup>(</sup>a) See the Highway Act, 1864, 27 & 28 Vict. c. 101, s. 21.

which the land to be inclosed shall be situate "(b). An Inclosure Act giving power to stop highways within a parish was held to authorise stopping a way through the parish, though the way through the adjoining parish was thereby stopped at the extremity and converted into a cul de sac (c).—If both ends of a highway be legally stopped, it is practically extinguished, by reason of the public being deprived of all access to the intermediate part; but the stopping of one end only would not necessarily have that effect, for it may remain a highway in all other respects with access from elsewhere (d).

Destruction of way.

A highway may be extinguished in fact by the destruction of the land on which it passes; as in the case of the road and the land being washed away by the sea; the ordinary liability to repair does not extend to replacing the land as the foundation of the road (e). In the case of a partial destruction, as by a landslip, the liability to restore the road depends upon whether it is reasonably practicable to do so within the limits of repairing, properly so called (f).

(b) See *Hornby* v. *Silvester*, L. R.20 Q. B. D. 797.

Downshire, 4 A. & E. 698; Gwyn v. Hardwicke, supra.

<sup>(</sup>c) Gwyn v. Hardwicke, 1 H. & N. 49; 25 L. J. M. 97, ante, p. 486.

<sup>(</sup>d) Bailey v. Jamieson, L. R. 1 C. P. D. 329; see The King v.

<sup>(</sup>e) The Queen v. Bamber, 5 Q. B. 279; The Queen v. Hornsea, 23 L. J. M. 59.

<sup>(</sup>f) The Queen v. Greenhow, L. R. 1 Q. B. D. 703; 45 L. J. M. 141.

## § 3. MAINTENANCE AND REPAIR OF HIGHWAYS.

Liability of parish to repair at common law-liability of township or district by custom.

Repair of new highways-turnpike roads-private ways made public by order of justices.

Conditions of liability of parish under the Highway Act-certificate of justices-highways not repairable by the parish-highways declared unnecessary.

Repair under Highway Acts-highway board-district fund.

Main roads—transfer of main roads to county council—delegation to district council.

Improvement of highways—statutory powers of improvement.

Liability to repair by prescription—by tenure of land—by inclosure discharge of liability by tenure or otherwise.

Repair of bridges-Statute of Bridges-construction of statute.

New bridges-repair of new bridges-conditions of repair by countyimprovement of bridges.

Bridges built under statutes—canal bridges—railway bridges—turnpike road bridges.

Transfer of bridges to county councils.

What structures are county bridges-approaches to bridges-roadway of bridges-property in bridges-ferry.

The general principle as to repair of highways is stated Liability of as follows:—"The parish is at common law bound to re-parish to repair. pair all public highways within it; this being the mode by which each parish contributes its share towards the public burthen of repairing all highways, instead of all the public roads being repaired by one general tax; and its inhabitants receive an equivalent, not in the use of those roads in particular, but in the use of all the public roads in the realm "(a).—"A township or other known portion Liability of of a parish may by usage and custom be chargeable to the district by repair of the highways within it"; to the exemption of custom. the rest of the parish (b). And the district of a parish

<sup>(</sup>a) Parke, J., The King v. Leake, 5 B. & Ad. 482; per cur. Bussey v. Storey, 4 B. & Ad. 109.

<sup>(</sup>b) The King v. Ecclesfield, 1 B, & Ald. 359; The King v. Hatfield, 4 B. & Ald. 75; The Queen v. Heage, 2 Q. B. 128,

thus exclusively bound by custom to repair its own highways, in consideration of such liability, is presumptively exempt from the general liability of the parish to repair all other highways (c). A claim to such exemption would be unreasonable and void, unless supported by the consideration of repairing the roads within the district; so that if in fact there are no roads within the district, the claim cannot be maintained (d). Accordingly, a parish may be divided into several districts, the inhabitants of each of which may be bound by custom to repair its own highways as if it were a separate parish, with exemption from the repair of the highways in the rest of the parish (e). The liability of the parish at large is imposed by common law, which is judicially noticed; but the liability or exemption of a part of a parish is by special custom. which must be alleged and proved by the party asserting it (f). Extra parochial districts may be chargeable with repair by custom; but it seems that they cannot be charged at common law (g).—There cannot be a custom for the inhabitants of a parish or district to repair the highways in another parish or district, for customs are essentially restricted to the locality in which they prevail. Such an arrangement may be made by agreement between two parishes or districts, and will be effectual so long as it is carried out (h). But a mere agreement with other parties to repair the roads cannot discharge a parish from the

(c) Freeman v. Read, 4 B. & S. 174; 32 L. J. M. 226; The Queen v. Rollett, L. R. 10 Q. B. 469; 44 L. J. M. 190.

<sup>(</sup>d) The Queen v. Rollett, supra; Lush, J., dissentiente, holding that the contingent liability to repair new roads would be a sufficient consideration.

<sup>(</sup>e) The King v. Bridekirk, 11 East, 304; The King v. Kings' Newton, 1 B. & Ad. 826; The Queen v. Barnoldswick, 4 Q. B. 499; The Queen v. Ardsley, L. R. 3 Q. B. D.

<sup>255; 47</sup> L. J. M. 65.

<sup>(</sup>f) Per cur. The King v. Sheffield, 2 T. R. 111; The King v. Penderryn, 2 T. R. 513; The King v. Hatfield, 4 B. & Ald. 75.

<sup>(</sup>g) The King v. Kingsmoor, 2 B. & C. 193.

<sup>(</sup>h) The King v. St. Giles, Cambridge, 5 M. & S. 260; The King v. Machynlleth, 2 B. & C. 166; Dawson v. H'illoughby, 5 B. & S. 920; 34 L. J. M. 37; The Queen v. Ardsley, L. R. 3 Q. B. D. 255; 47 L. J. M. 65.

common law liability to do so; nor can it charge the other parties with the public liability (i).

At common law the liability of the parish to repair ex- Repair of new tended to all new highways within it, whether created by highways. statute or by dedication, which were not otherwise specially provided for in their creation. And "by the general rule of law, the inhabitants of any district, who were liable to the repair of all the roads therein previously to the introduction of a new highway, are also liable to the repair of that highway "(j). Thus, where a way originally set out as a private way under an Inclosure Act, to be used and repaired by particular persons only, afterwards became a public way by user, it was held that the parish thereupon became liable for the repair (k). Where a public foot-way had been constructed outside the parapet of an ancient bridge, which was repairable by the tenants of certain land, ratione tenura, it was held that the public were liable to repair the foot-way (l). And where a public foot-way is acquired over a private carriage way, or where a public foot-way is enlarged into a private carriage way, the liability of the parish to repair is limited to the foot-way, and they are chargeable only pro ratâ (m).-Upon this principle the turnpike roads created by statute Turnpike become repairable by the inhabitants of the parish or district; and the imposition of tolls in aid of repair imports no exemption from liability, in the event of the tolls proving inadequate, or the turnpike trustees neglecting their duty to repair (n). Turnpike trusts and tolls have for the

<sup>(</sup>i) The Queen v. Ashby Folville, L. R. 1 Q. B. 213; 35 L. J. M. 154; The King v. Liverpool, 3 East, 86; see The King v. St. George, 3 Camp. 222.

<sup>(</sup>j) The King v. Netherthong, 2 B. & Ald. 179; The King v. Shefield, 2 T. R. 106; The Queen v. Barnolds-wick, 4 Q. B. 499.

<sup>(</sup>k) The Queen v. Bradfield, L. R. 9 Q. B. 552; 43 L. J. M. 155; see

The King v. St. Benedict, 4 B. & Ald. 447; see ante, p. 506.

<sup>(</sup>l) See The King v. Middlesex, 3 B. & Ad. 201.

<sup>(</sup>m) King v. West Riding, 2 East. 353 (a).

<sup>(</sup>n) The King v. Netherthong, 2 B. & Ald. 179; Bussey v. Storey, 4 B. & Ad. 98; The Queen v. Lords-mere, 15 Q. B. 689; The Queen v. French, L. R. 3 Q. B. D. 187.

Private ways made public by order of justices, most part been abolished, leaving the liability for the repair of the roads upon the parishes and districts in which they are situated (n). By the Highway Act, 1862, 25 & 26 Vict. c. 61, s. 36, "Where the inhabitants of any parish are desirous of undertaking the repair and maintenance of any drift-way, or any private carriage or occupation road, in return for the use thereof, the district surveyor may at the request of the inhabitants in vestry assembled, and with consent of the owner, apply to Justices in Petty Sessions; and upon such application it shall be lawful for the Justices to declare the same to be a public carriage road to be repaired at the expense of the public."

Conditions of liability of parish under Highway Act.

The liability to repair a newly dedicated highway attached to the parish at common law without any formality or condition, beyond the acceptance of the dedication by the public at large (o). But by the Highway Act, 1835, 5 & 6 Will. IV. c. 50, s. 23, certain formalities are required to be gone through as a condition of the liability. enacts "that no road made, or hereafter to be made, by or at the expense of any individual or private person, body politic or corporate, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person proposing to dedicate such highway to the use of the public shall give three calendar months' notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, and shall have made the same in a substantial manner, and to the satisfaction of the said surveyor and of two justices of the peace of the division in which such highway is situate, who are hereby required to view the same, and to certify that such highway has been made in a substantial manner, which certificate shall be enrolled at the Quarter Sessions; then and in such case after the

Certificate of justices.

<sup>(</sup>n) See the Turnpike Acts, 1870, 1874; 33 & 34 Vict. c. 73, s. 10; 37 & 38 Vict. c. 95, s. 10; High-

way Act, 1878, 41 & 42 Vict. c. 77, s. 13, post, p. 524. (o) Ante, p. 508.

said highway shall have been used by the public, and duly kept in repair by the said person for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate: provided nevertheless that on receipt of such notice the surveyor of the said parish shall call a vestry meeting, and if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the parish, a justice of the peace shall summon the party proposing the new highway to appear at the next special sessions, and the question as to the utility of such highway shall be determined at the discretion of such justices" (p).

A highway may still become public by dedication and Highways not acceptance, although, by reason of non-compliance with repairable by parish. the above formalities, it may not be a highway which the inhabitants of the parish are compellable to repair (q). The person who dedicated the way would not become bound to repair it by reason of the dedication; nor would he become so by reason of his having done merely voluntary repairs. A highway may thus be newly created by dedication, without obligation upon any person to repair it (r). So highways which have been declared by order of justices, Highways obtained under the Highways Act, 1878, to be "unnecessary declared unnecessary." for public use," cease to be repairable by the public, but do not cease to be highways; and if they afterwards become of public use, the liability to repair may be revived (s).

The maintenance and repair of highways are now, for Repair under the most part, regulated by statutes, commonly known as Highway the "Highway Acts" (t). These Acts provide for the com-

<sup>(</sup>p) As to this section, see The Queen v. Bagge, 44 L. J. M. 45.
(q) Roberts v. Hunt, 15 Q. B. 17.
(r) Roberts v. Hunt, supra; The Queen v. Wilson, 18 Q. B. 348; 21 L. J. Q. B. 281; Healey v. Batley, L. R. 19 Eq. 375; 44 L. J. C. 642.
(s) See Highway Acts, 27 & 28

Vict. c. 101, s. 21; 41 & 42 Vict. c. 77, s. 24; ante, p. 517. (t) The Highway Act, 1835, 5 & 6 Will. 4, c. 50; 1862, 25 & 26 Vict. c. 61; 1864, 27 & 28 Vict. c. 101; 1878, 41 & 42 Vict. c. 77; and see the Local Government Act, 1888, post, p. 525.

Highway boards.

bination of parishes and any places maintaining their own highways into "highway districts;" and for the formation of a "highway board" for each district, consisting of waywardens elected in the several places within the district, and of the justices acting for the county and residing within the district. And by these Acts all the property, debts, powers, rights, duties, liabilities, capacities and incapacities, of the surveyors of the parishes forming the district are vested in and attached to the highway board; who are required to appoint a district surveyor to act as agent of the board in the performance of their duties .--District fund. By the Acts of 1862, 1864, the expenses incurred for officers and for the common use of the district were charged to a district fund, contributed by the several parishes rateably; and the expenses of maintaining and keeping in repair the highways of each parish were made a separate charge upon each parish, as at common law. But by the Act of 1878, s. 7, all the expenses of maintaining and repairing the highways within the district, together with all other expenses of the board, were charged upon the district fund. This section was held to change only the

Main roads.

The Act of 1878, s. 13, created a class of roads called "main roads," consisting of turnpike roads which ceased to be such since a certain time before the passing of the Act; and roads ordered by the county authority to be main roads, "by reason of being a medium of communication

as at common law, and not against the board (u).

incidence of the expense, without transferring to the board at large any right to dispute the liability to repair, which is referred by the Act of 1862, s. 18, to the waywarden of the parish; and in case of the waywarden disputing the liability an indictment must be brought against the parish,

<sup>(</sup>u) Loughborough Highway Board v. Curzon, L. R. 16 Q. B. D. 565; 55 L. J. M. 122; The Queen v. Mayor of Poole, L. R. 19 Q. B. D.

<sup>602; 56</sup> L. J. M. 131; but see *The Queen* v. *Mayor of Wakefield*, 57 L. J. M. 52; *post*, p. 539.

between great towns, or a thoroughfare to a railway station or otherwise." And it provided as to main roads that "one-half of the expenses incurred by the highway authority in the maintenance of such road shall be paid to the highway authority by the county authority out of the county rate, on the certificate of the surveyor of the county authority to the effect that such main road has been maintained to his satisfaction" (v).

By the Local Government Act, 1888, 51 & 52 Vict. Transfer of c. 41, s. 11 (1), "Every road in a county which is for the county time being a main road within the meaning of the High-council. way Act, 1878, inclusive of every bridge carrying such road if repairable by the highway authority, shall, after the appointed day, (1st April, 1889, see s. 109,) be wholly maintained and repaired by the council of the county in which the road is situate, and such council shall have the same powers and be subject to the same duties as a highway board, and may further exercise any powers vested in the council for the maintenance and repair of bridges, and the enactments relating to highways and bridges shall apply accordingly; and the execution of this section shall be a general county purpose, and the cost thereof shall be charged to the general county account."-(2) "Provided that any urban authority may within twelve months claim to retain the powers and duties of maintaining and repairing a main road within the district of such authority, and thereupon they shall be entitled to retain the same, and the council shall make to such authority an annual payment towards the cost of the maintenance and repair."—(3) The amount to be agreed on, or determined by arbitration.—(4) "The county council and any district council may from time to time contract

<sup>(</sup>v) Highway Act, 1878, ss. 13— 15. What are turnpike roads within this enactment, see West Riding v. The Queen, L. R. 8 Ap. Ca. 781; 53 L. J. M. 41; Lanca-shire v. Rochdale, L. R. 8 Ap. Ca.

<sup>494; 53</sup> L. J. M. 5; Lancaster v. Newton, 56 L. J. M. 17. What is "maintenance" of the road within the Act, see Leek Commiss. v. Stafford, L. R. 20 Q. B. D. 794; 57 L. J. M. C. 102; post, p. 527.

for the undertaking by the district council of the maintenance, repair, improvement and enlargement of any main road; and, if the county council so require, the district council shall undertake the same, and such undertaking shall be in consideration of such annual payment by the county council as may from time to time be agreed upon, or in case of difference be determined by arbitration."—
(5) "In no case shall a county council make any payment until the county council are satisfied by the report of their surveyor that the road has been properly maintained and repaired."—(6) "A main road and the materials thereof and all drains belonging thereto" shall, except as aforesaid, vest in the county council.

Delegation to district council.

By s. 28 (2), power is given to the county council to delegate "any powers or duties transferred to them by this Act, either to any committee of the county council, or to any district council in this Act mentioned."—And by s. 100, the expression "district council" means "any district council established for purposes of local government under an Act of any future Session of Parliament; and until such council is established" means, "as regards the provisions of this Act relating to highways and main roads, a highway authority." "The expression highway authority' means, as respects an urban sanitary district, the urban sanitary authority, and as respects a highway district, the highway board, or authority having the powers of a highway board."

Improvement of highways.

The parish at common law is not bound to put a highway into better condition than it has been time out of mind, but as it has been usually at the best (u). Nor has it any liability or power to widen and enlarge a highway that is insufficient, for it has no power to take the additional land required (x). Nor can an owner of land ad-

<sup>(</sup>w) The Queen v. Cluworth, I Salk. 359.

<sup>(</sup>x) The Queen v. Stretford, 2 L. Raym. 1169; 11 Mod. 56; The King v. Deron, 4 B. & C. 670.

joining a highway, by extending the width of the road, throw the burden of repairing the newly dedicated part upon the parish (y).—The obligation to repair does not extend to the restoration of a road, which has been totally destroyed by being swept away by the sea (z). But the raising of a road, which had sunk through subterraneous mining, to the former level, was held to be an ordinary repair within the duty of a surveyor of highways, requiring no statutory power and raising no claim for compensation from the owners of the adjoining tenements which were left at the lower level (a). The conversion of a macadamised road into a road paved with granite setts was held not to be an expense incurred in the "maintenance" of the road within the Highway Act, 1878, s. 13, entitling the highway authority to payment of half the expense by the county authority (b).

By the Highway Act, 1835, 5 & 6 Will. IV. c. 50, Statutory s. 82, power is given to justices to order highways to be improvement. widened and enlarged, to the limit of thirty feet in breadth, provision being made for compensation to the owner of the land taken. And by sect. 67, the surveyor has power "to make, cleanse, and keep open all ditches, drains, and watercourses as he shall deem necessary, in and through any lands or grounds adjoining or lying near to any highway," subject to compensation to the owner (c). -By the Highway Act, 1864, 27 & 28 Vict. c. 101, ss. 47, 48, power is given to highway boards to make improvements in the highways and to borrow money for the purpose. The improvements authorised are: "the conversion of any road that has not been stoned into a stoned road; the widening of any road, the levelling roads, the making any new road, and the building or enlarging

<sup>(</sup>y) Richards v. Kessick, 57 L. J. M. C. 48. (z) The Queen v. Bamber, 5 Q. B. 279; The Queen v. Hornsea, 23 L. J. M. 59; see The Queen v. Green-how, L. R. 1 Q. B. D. 703; 45 L. J. M. 141; see ante, p. 518.

<sup>(</sup>a) Burgess v. Northwick, L. R. 6 Q. B. D. 264; 50 L. J. Q. B. 219.

<sup>(</sup>b) Leek Commiss. v. Stafford, L. R. 20 Q. B. D. 794; 57 L. J. M. C. 102; see ante, p. 525. (c) See Croft v. Rickmansworth,

<sup>57</sup> L. J. C. 589.

bridges; the doing of any other work in respect of highways beyond ordinary repairs essential to placing any existing highway in a proper state of repair."

Liability to repair by prescription.

"A particular person cannot be bound to repair by prescription, scil., that he and all his ancestors have repaired, if it be not in respect of the tenure of his land, taking of toll, or other profit; for the act of the ancestor cannot charge the heir without profit." But a corporation, sole or aggregate, may be bound to repair by prescription only, scil., that they and their predecessors time out of mind have repaired; for a corporation may bind their successors, continuing the same corporation (c). A corporation may be bound to repair by the terms of their charter, by acceptance of which they bound themselves, according to the terms, to do the repairs; and the public may enforce the obligation (d). And the grant of a charter, with charge of repair, may be implied as the legal origin of a prescriptive liability.

Liability by tenure of land. The tenure of land, to which the burden or service of repairing a road is prescriptively annexed, is a sufficient consideration for charging the tenant with the repair; and he is technically described as liable to the repair ratione tenuræ (e). In such case the parish, which is charged with repair at common law, or a part of the parish, charged by custom, may discharge itself by pleading and proving with certainty that another person is bound to repair; and only in the event of his default the liability reverts to the parish (f).

The inhabitants of a parish or district cannot be charged with liability by reason of the tenure of land, because as inhabitants, unincorporated, they cannot hold land; their

<sup>(</sup>c) 13 Co. 33, Case of Bridges; 2 Co. Inst. 700; The King v. St. Giles, 5 M. & S. 260.

<sup>(</sup>d) Lyme Regis v. Henley, 3 B. &

<sup>(</sup>e) The King v. Kerrison, 1 M. & S. 435.

<sup>(</sup>f) The King v. Hatfield, 4 B. & Ald. 75; The Queen v. Ely, 15 Q. B. 827; 19 L. J. M. 223; Holt, C. J., Anon., 1 L. Raym. 725.

liability is at common law or by custom (g).—The obligation to repair by reason of tenure runs with the land, and with every part of the land, so that a tenant of any part is primarily liable to the whole charge of the repair; upon discharging which he becomes entitled to claim contribution from the other tenants. If the owner of the whole sell several parts, and agree with the several purchasers to discharge them of the liability to repair, such agreement affects the incidence of the liability as between the parties only, and does not affect the remedy of the public; for a tenant has no power to apportion the charge as against the public (h).

Liability to repair a highway may arise at common law Repair by from the inclosure of the adjacent land. Where the public reason of inclosure. from time immemorial have used to deviate from an open highway whenever it was out of repair and impassable, if the owner of the land incloses the adjoining land, he incurs the obligation of keeping the road in such repair as to prevent the necessity for deviating. He is, in general, entitled to inclose, as owner of the land; subject to the right of the public to have a road of sufficient width and in a proper state of repair. But he is chargeable with the repair only so long as the inclosure is continued, and upon opening it to the highway again, the liability ceases; in this respect differing from a liability to repair ratione tenuræ which is permanently incident to the tenure of the land (i). The Highway Act, 1862, 25 & 26 Vict. c. 61, s. 46, now provides that "no person shall become liable for the repair of a highway by erecting fences between such highway and the adjoining land, if such fences are erected with the consent in writing of the Highway Board of the district, or of the surveyor or other authority having jurisdiction over the highway."

The Highway Act, 1862, 25 & 26 Vict. c. 61, s. 34, Discharge

<sup>(</sup>g) The King v. Machynlleth, 2 B. & C. 166. (h) 2 Co. Inst. 700; The Queen v. Duchess of Bucklugh, 1 Salk. 358. (i) The King v. Stoughton, 2 Wms. Saund. 160; ante, p. 528.

liability by tenure and otherwise. provides that "where any highway, which any body corporate or person is liable to repair by reason of tenure of any land or otherwise howsoever, shall be adjudged in the manner provided by the Act to be out of repair, the Highway Board of the district may direct their surveyor to repair the same; and the expenses shall be paid by the party liable to repair "(h).—And by sect. 35, any person or corporation, liable to repair any highway by reason of tenure of land, or otherwise, may apply to justices in petty sessions, who, after examining the matter, "shall, if they think fit, make an order that such highway shall thereafter be a highway to be repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board in full discharge of all claims thereafter in respect of the repair and maintenance of such highway." By the Highway Act, 1864, 27 & 28 Vict. c. 101, s. 24, the Highway Board may apply under the above section for the same purpose.—The Local Government Act, 1888, s. 97, expressly provides that "nothing in this Act with respect to main roads shall alter the liability of any person or body of persons, corporate or unincorporate, not being a highway authority, to maintain and repair any road or part of a road "(i).

Repair of bridges.

Bridges in highways are, as regards the public use, part of the highway; but as regards repair, they are at common law charged presumptively upon the inhabitants of the county, and not, with the rest of the highway, upon the parish. By immemorial custom the inhabitants of a particular district within the county, as a hundred, riding, city, borough, township or parish, may be bound to repair the bridges within such district (j). A particular person or a body corporate may be bound to repair a bridge by reason of the tenure of lands or tenements to which the repair is

 <sup>(</sup>h) See Highway Act, 1864, s. 23.
 (j) As to what are county bridges, see post, p. 536.

incident; and a body corporate may be bound to repair by prescription only. But the liability primâ facie lies upon the county, who can discharge themselves only by proving that some other district or person is liable for the repair (k).

Act concerning the amendment of Bridges in Highways," Bridges. after reciting that "in many parts of this realm it cannot be known and proved what hundred, riding, city, borough, town, or parish, nor what person certain or body politic, ought of right to make such bridges decayed; by reason whereof such decayed bridges for the most part lie long without any amendment, to the great annoyance of the king's subjects;" for the remedy thereof enacts, "that in every such case the said bridges, if they be without city or town corporate, shall be made by the inhabitants of the shire or riding within which the said bridge decayed shall happen to be; and if it be within any city or town corporate, then by the inhabitants of every such city, or town

corporate, wherein such bridges shall happen to be." And if part of any such bridges happen to be within the limits of one shire, riding, city, or town corporate, and part without, the inhabitants shall be charged to repair such part as

is within.

The Statute of Bridges, 22 Hen. VIII. c. 5, entitled "An Statute of

This statute is declaratory of the common law, and Construction creates no new liabilities; it applies only to counties and to cities and boroughs, which are liable to the repair of bridges by common law or by custom, with the consequence of imposing upon them any public bridge within their limits of which it cannot be known or proved what person certain is to make the repair. Therefore, where by the extension of a borough a bridge was brought within the boundaries, the borough being under no general customary liability to repair bridges, it was held that the statute had

of the statute.

<sup>(</sup>k) 2 Co. Inst. 700; The King v. King v. West Riding, 5 Burr. 2594; The King v. Salop, 13 East, 97; The p. 528. King v. Hendon, 4 B. & Ad. 628. As to repair ratione tenura, see ante,

no operation, and the liability remained fixed upon the county, although the extended borough was withdrawn from the county rate (1).—The word "riding" in the statute is not restrained to districts called by that name, but includes any division of a county which corresponds to a riding (m). The county of a town created by charter is a "shire" within the Act, and liable to the repair of public bridges, to the exclusion of the liability of the county from which it was taken (n).

New bridges.

Repair of new bridges.

"None can be compelled to make new bridges, where never any were before, but by Act of Parliament" (o). And the liability of the county to repair bridges does not extend to the making of a bridge, where there was none before (p). "If a man make a bridge for the common good of all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but ratione tenuræ or præscriptionis;" but if it is afterwards used by the public, it becomes a public bridge, and repairable at common law by the county (q). Thus, where the inhabitants of a township built a carriage bridge over a ford, where there was before only a foot bridge repairable by the township, and the public always afterwards used the bridge, it was held that the county was bound to repair it as a carriage bridge, the township remaining liable pro ratâ for the repair of it as a foot bridge (r). So where a public footbridge was added to an ancient carriage bridge which was repairable ratione tenuræ, the county was held liable for the repair of the foot

<sup>(</sup>l) Case of Bridges, 13 Co. 33; The Queen v. New Sarum, 7 Q. B.

<sup>(</sup>m) The Queen v. Ely, 15 Q. B.
827; 19 L. J. M. 223.
(n) The Queen v. Southampton,
L. R. 17 Q. B. D. 424; 55 L. J. M.

<sup>(</sup>o) 2 Co. Inst. 701; see Magna Carta, 22 Ed. I. c. 15, declaratory

of the common law, 2 Co. Inst. 29; and see Nicholl v. Allen, 1 B. & S. 916; 31 L. J. Q. B. 48.

<sup>(</sup>p) Littledale, J., The King v. Invon, 4 B. & C. 680.
(g) 2 Inst. 701.
(r) The King v. West Riding, 2 East, 353, n. (a); and see The King v. West Riding, 5 Burr. 2594; 2 W. Black. 685.

bridge (s). Where a person for his own benefit built a mill and a bridge, where before there was a public ford, so that the public of necessity used the bridge instead of the ford, it was held that the county and not the millowner was bound to repair (t). Where the owner of a public ferry built a bridge in place of the ferry, which became by use a public bridge, upon the bridge being afterwards removed by the owner of the ferry, the county was held bound to rebuild it (u).

If a new bridge is not of public utility, it may be re- Conditions moved as a nuisance; but if acquiesced in and used by the of repair by county. public, though not of absolute necessity, it is presumed to be of public utility and becomes a public bridge; and as such, it is thereupon chargeable upon the county at common law, without any formal act of acceptance (v).—But Satisfaction now by 43 Geo. III. (1803), c. 59, s. 5, "for the more surveyor. clearly ascertaining the description of bridges, hereafter to be erected, which inhabitants of counties shall be liable to repair and maintain," it is enacted "that no bridge hereafter to be erected or built, by or at the expense of any private person or persons, body politic or corporate, shall be deemed to be a county bridge, which the inhabitants of any county shall be liable to repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor" (w).—This enactment only applies to bridges newly erected or built after the passing of the Act; and the widening, or improving, or even rebuilding since the Act of a bridge existing before does not bring it within the Act(x). The satisfaction of the above condition is

<sup>(</sup>s) The King v. Middlesex, 3 B. & Ad. 201. See ante, p. 521.

<sup>(</sup>t) The King v. Kent, 2 M. & S.

<sup>(</sup>u) The King v. Bucks, 12 East, 192.

<sup>(</sup>v) The King v. West Riding, 2 East, 342; Abbott, C.J., The King v. Netherthong, 2 B. & Ald. 183.

See The Queen v. Southampton, L. R. 17 Q. B. D. 424; 56 L. J. M. 112; 19 Q. B. D. 590.

<sup>(</sup>w) See the Highway Act, 1878, 41 & 42 Viet. c. 77, ss. 21, 22.

<sup>(</sup>x) The King v. Lancashire, 2 B. & Ad. 813; The King v. Devonshire, 5 B. & Ad. 383,

not conclusive upon the county, unless the bridge is also of public utility and adopted by the inhabitants (y).

Improvement of bridges.

The county at common law are bound to repair and maintain a public bridge in the state in which it was built and became public; but it is said that "as a county is not bound to make a bridge, it is not bound to widen one, because the addition beyond the existing width would be pro tanto a new bridge" (z). Now by the statute 43 Geo. III. c. 59, after reciting that "doubts have arisen how far the said inhabitants are liable to improve such bridges when they are not sufficiently commodious for the public," it is enacted (s. 2) that justices in quarter sessions may "order such bridges to be widened, improved, and made commodious for the public," and if necessary "order the same to be rebuilt, either on the old site, or on any new one more convenient to the public"; and power is given for the purchase of land for the purpose.

Bridges built under statutes.

Railway bridges.

Where statutory power is given to a person or corporate body to make a bridge to carry a public highway, for their own private purposes, it may be an express or implied condition of the exercise of their power that they maintain and repair the bridge; and in such case though the public necessarily use the bridge, there is no liability resulting Canalbridges. upon the county or district for the repair; as where a canal company or navigation commissioners are empowered by statute to cut through a highway, thereby rendering a bridge necessary to carry the road (a).—In the case of railways crossing highways, it is enacted by the Railway Clauses Consolidation Act, 8 Vict. c. 20, s. 46, that either the road shall be carried over the railway, or the railway shall be carried over the road, by means of a bridge, of the construction provided in ss. 49-52; "and such bridge,

<sup>(</sup>y) The Queen v. Southampton, L. R. 17 Q. B. D. 424; 56 L. J. M.

<sup>(</sup>z) The King v. Devon, 4 B. & C. 679; ante, p. 526; but see Cumber-

land v. The King, 3 B. & P. 354. (a) The King v. Lindsey, 14 East, 317; The King v. Kerrison, 3 M. & S. 526; The Queen v. Ely, 15 Q. B. 827; 19 L. J. M. 223.

with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the com-The roadway is part of the bridge which the company by this section are bound to make and maintain (b).—Bridges built by trustees of a turnpike road Turnpike under an Act of Parliament are public bridges which the road bridges. county is bound to repair; and the county may be charged primarily, although the trustees may receive tolls which are applicable to the repair of the road (c). But these bridges are within the above Act of 43 Geo. III., and if built since the Act, they are not chargeable upon the county, unless erected in a substantial manner and to the satisfaction of the county surveyor (d). By 33 & 34 Vict. c. 73, s. 12, "Where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges and shall be kept in repair accordingly."

By the Local Government Act, 51 & 52 Vict. c. 41, s. 3, Transfer of "There shall be transferred to the council of each county county on and after the appointed day (1 April, 1889, see councils. sect. 109) all business done by the quarter sessions in respect of the several matters following, namely, (inter alia) (viii.) Bridges and roads repairable with bridges, and any powers vested by the Highways Act, 1878, in the county authority."—By sect. 6, "The county council shall have power to purchase or take over on terms to be agreed on, existing bridges not being at present county bridges, and to erect new bridges, and to maintain, repair, and improve any bridges so purchased, taken over, or erected."—And by sect. 11, "every road in a county which is for the time

 <sup>(</sup>b) Bury v. Lancashire & Y. Ry.,
 L. R. 20 Q. B. D. 485; 57 L. J.
 Q. B. 280.

<sup>(</sup>c) The King v. West Riding, 2 East, 342; The King v. Oxford-

shire, 4 B. & C. 195. See The King v. Lancashire, 2 B. & Ad.

<sup>(</sup>d) The King v. Derbyshire, 3 B. & Àd. 147,

being a main road, inclusive of every bridge carrying such road, if repairable by the highway authority, shall, after the appointed day, be wholly maintained and repaired by the council of the county; and such council shall have the same powers and be subject to the same duties as a highway board, and may further exercise any powers vested in the council for the purpose of the maintenance and repair of bridges, and the enactments relating to highways and bridges shall apply accordingly "(e).

What are county bridges.

The bridges within the common law liability of the county to repair are such only as carry a highway, whether footway, bridleway, or carriage way, over a river or water-course; there must be "water flowing in a channel between banks more or less defined, although such channel may be occasionally dry" (f). A causeway over meadows occasionally flooded with water, having culverts at intervals to let the water pass through for the safety of the structure, was held not to be a bridge repairable by the county (g). It is not a necessary condition of a county bridge that it must have parapets (h).

Approaches to bridges.

By the common law, declared and defined by the Statute of Bridges, 22 Hen. VIII. c. 5, s. 9, it is enacted "that such part of the highways as lie next adjoining to the ends of any bridges distant from any of the said ends by the space of three hundred foot, be made, repaired, and amended, as often as need shall require." The liability of the county to repair extends to the approaches thus defined; and a new bridge, becoming a public bridge, carries with it the same approaches repairable by the county (i). But the liability to repair approaches does not apply to a substantive bridge situate within the limits (j).—The prescriptive liability of a person or corporate body to repair

<sup>(</sup>e) See ante, p. 525. (f) Per cur. The King v. Oxfordshire, 1 B. & Ad. 301. See The King v. Salop, 13 East, 95. (g) The King v. Oxfordshire, supra.

<sup>(</sup>h) The King v. Whitney, 3 Ad. & El. 69.
(i) The King v. West Riding, 7
East, 588; 5 Taunt. 284.
(j) The King v. Devon, 14 East,

a bridge prima facie includes repair of the approaches within the same limits (k).

By the Highway Act, 5 & 6 Will. IV. c. 50, s. 21, "If Roadway of any bridge shall hereafter be built, which shall be liable by bridges. law to be repaired by and at the expense of any county or part of any county, then all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law before the erection of the said bridge bound to repair the said highways: provided that nothing herein contained shall extend to exonerate or discharge any county from repairing the walls, banks, or fences of the raised causeways and approaches to any such bridge, or the land arches thereof." The effect of this enactment is to throw the repair of the surface roadway upon the parish, or other persons by law bound to repair the highway, leaving the repair of the structure upon the county (1). Bridges carrying a public highway over or under a railway are required by the Railway Clauses Act, 1845, "to be executed and maintained at the expense of the company"; and under this enactment the company are bound to repair the roadway, as well as the structure of the bridge (m).

A bridge, which is part of a highway, is presumptively Property in the property of the owner of the soil on which it stands, bridges. subject to the public right of free passage (n). But the materials of a public bridge may, by license of the owner of the soil, remain the property of the original owner after building them in, subject to the dedication to public use: so that if afterwards removed or taken to pieces, they revert to him in exclusive possession (o).

Where there is no bridge in a highway through a river, Ferry.

<sup>(</sup>k) The Queen v. Lincoln, 8 A. & E. 65.

<sup>(</sup>l) The Queen v. Southampton, L. R. 17 Q. B. D. 424.

<sup>(</sup>m) Bury v. Lancashire & Y. Ry., L. R. 20 Q. B. 485; 57 L. J. Q. B.

<sup>280.</sup> See ante, p. 534. (n) 2 Co. Inst. 705.

<sup>(</sup>o) Harrison v. Parker, 6 East, 154. See The King v. Bucks, 12 East, 192. And see ante, p. 107.

it is a prerogative right of the Crown to grant a public ferry with charge of toll; therefore "no man may set up a common ferry for all passengers without a prescription time out of mind or a charter from the king." The grantee is bound "to give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is fineable" (p).—The building of a bridge in place of a ferry is primâ facie wrongful and actionable, as being a disturbance of the ferry; and the owner of a ferry cannot convert it into a bridge without license of Crown; but the Crown may do so by its prerogative right, and the bridge so erected may become a public bridge, and, as such, repairable by the county (q).

## § 4. Remedies relating to Highways.

Indictment for non-repair—against surveyor of highways—against highway authority.

Action for non-repair against county or parish—against surveyor—against highway authority—against person or body corporate.

Summary remedies for non-repair—against surveyor—against highway board—order of county authority to repair.

Indictment for nuisance—nuisances upon highway.

Action for nuisance—special damage—action against surveyor—against local board—abatement of nuisance.

Summary remedies for nuisances—penalties for wilful obstruction—encroachment on sides of highway—removal of nuisance.

Remedy for non-repair by indictment; The ordinary remedy of the common law for the repair of a highway is by indictment at the suit of the Crown, on behalf of the public collectively, against the inhabitants of the parish, or the person or persons who are liable for the repair. The indictment charges that the road is a highway, the liability to repair, and the want of repair. The judgment upon conviction is a fine; which by statute

<sup>(</sup>p) Hale de J. Maris, Hargrave's
Tracts, 6. See ante, p. 514.

(q) The King v. Bucks, 12 East,

192; Payne v. Partridge, 1 Show.
255; S. C. Pain v. Patrick, 3 Mod.
294.

is to be applied towards the repair and amendment of the highway (a). The proceeding being a criminal one in form, the Court cannot grant a new trial; but the Court may suspend all proceedings upon the judgment, so as to give an opportunity for a fresh indictment to be brought (b).

An indictment for not repairing a highway will not lie against suragainst the parish surveyor of highways, he being a sta-veyor of highway; tutory officer against whom special remedies are provided by the Highway Acts, to the implied exclusion of any other procedure (c). Hence also an indictment for not against repairing a highway will not lie against a highway board, authority. or other statutory authority, who merely stand in the place of surveyor of highways, his duties and liabilities being transferred to them by statutes. The indictment must be brought, as at common law, against the parish, or other person or corporate body, who are primarily liable to repair (d). But it is held that an indictment will lie against a local highway authority who dispute their liability under an order for repairs made by the county authority under the Highway Act, 1878, 41 & 42 Vict. c. 77, s. 10 (e).

No proceedings by action can be taken against the Action for inhabitants of a county, or parish, or district, or other against indeterminate body of persons; because of the uncertain county or and fluctuating character of such persons; and because parish; there is no corporate fund out of which satisfaction could be made; and because of the public nature of their duty (f). -Nor can any action for damages for mere non-repair against sur-

(a) 2 Co. Inst. 701; 5 & 6 Will. IV. c. 50, s. 96.

(c) Per cur. The Queen v. Mayor

c. 50, 8. 96.
(b) The King v. Wandsworth, 1
B. & Ald. 63; The King v. Sutton,
5 B. & Ad. 52; The Queen v. Dunean, L. R. 7 Q. B. D. 198; 50
L. J. M. 95; per cur. The Queen v.
Southampton, L. R. 19 Q. B. D.
599; 56 L. J. M. 118.

of Poole, L. R. 19 Q. B. D. 608; 56 L. J. M. 131. See post, p. 541. (d) The Queen v. Mayor of Poole, supra; per cur. Loughborough Highway Board v. Curzon, L. R. 16 Q. B. D. 570; 55 L. J. M. 122.

<sup>(</sup>e) The Queen v. Wakefield, L. R. 20 Q. B. D. 810; 57 L. J. M. 52. (f) Russell v. Men of Devon, 2 T. R. 667.

of the highway be brought against a surveyor of highways appointed by the parish under the Highway Acts; the surveyor being substituted for the parish by the statute merely for the more convenient performance of the duty of the inhabitants, with no new liability, and the principal not being liable to such an action, the surveyor, as agent, cannot be made liable (g). The statute 43 Geo. III. c. 59, s. 4, which provides that the inhabitants of a county may be sued in the name of their surveyor does not give any such action; the intention of the statute being only to afford a more convenient remedy in cases in which the county would be liable, and not to create any new liability (h).—Accordingly it is held that no such action will lie against a vestry incorporated under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, in whom are vested all the powers and duties of the surveyor of highways (i). And no such action will lie against a local board of health, constituted under the Public Health Acts, which place the board in the position of the surveyor of highways, over all "streets" or "highways repairable by the inhabitants" (i). But the surveyor of highways or highway authority appointed by statute may be liable to an action for damages caused by an actual obstruction or nuisance created or placed upon the highway by them, or by their servants, or by their order (k).

against highway authority.

Action against person or body corporate.

But against a determinate person or body corporate under liability to repair a highway, as in the case of a person bound to repair ratione tenuræ, or a corporate body under liability for repair by charter or by statute, an action will lie for non-repair, so far as to recover special damage sustained by an individual, over and above the

<sup>(</sup>g) Young v. Davis, 2 H. & C. 197; 31 L. J. Ex. 250.
(h) McKinnon v. Penson, 9 Ex. 609; 23 L. J. M. 97.

<sup>(</sup>i) Parsons v. St. Mathew, Bethnal Green, L. R. 3 C. P. 56; 37 L. J. C. P. 62.

<sup>(</sup>j) 11 & 12 Viet. c. 63, ss. 68, 117; 15 & 16 Viet. c. 42, s. 13; Gibson v. Mayor of Preston, L. R. 5 Q. B. 218; 39 L. J. Q. B. 131.

 <sup>(</sup>k) Foreman v. Canterbury, L. R.
 6 Q. B. 214; 40 L. J. Q. B. 138. See post, p. 545.

general injury suffered by the public in common; the public injury being matter for an indictment only and not a cause of private action (1).

Summary remedies for non-repair of a highway are pro-Summary vided by statute:—By the Highway Act, 1835, 5 & 6 non-repair Will. IV. c. 50, s. 94, "If any highway is out of repair the against surveyor; surveyor of the parish or other person chargeable is liable to a penalty upon conviction by justices of the district; who may further order that the repairs of the highway be done within a certain time, and in default the said surveyor or other person shall forfeit a sufficient sum of money to be applied to the repair." By sect. 95, if the obligation of such repairs is denied by the surveyor on behalf of the parish, or by any other party charged therewith, the justices are required to direct an indictment to be preferred; and the judge before whom the indictment is tried may order the costs to be levied out of the highway rate (m).— By the Highway Act, 1862, 25 & 26 Vict. c. 61, ss. 18, 19, against a similar remedy is provided against highway boards, in board. place of the parish surveyor; but giving the power to deny the liability to repair to the way-warden of the parish and not to the board or their surveyor; consequently the board are concluded by an admission of the way-warden (n). The summary remedy under these statutes applies where a highway is admitted, and the state of repair and the liability to repair only are disputed; if a bona fide question is raised as to the way being a highway, there is no jurisdiction in justices to determine it for the purpose of ordering an indictment for not repairing (o).

A summary remedy is also given by the Highway Act,

(l) Lyme Regis v. Henley, 3 B. & Ad. 77; Hartnall v. Ryde Commis., 4 B. & S. 361; 33 L. J. Q. B. 39; Chrby v. Ryde Commis., 5 B. & S. 743; 33 L. J. Q. B. 296; per cur. Bathurst v. Macpherson, L. R. 4 Ap. Ca. 269.

(m) The Queen v. Ipstones, L. R. 3 Q. B. 216; 37 L. J. M. 37; The

Queen v. Lee, L. R. 1 Q. B. D. 198; 45 L. J. M. 54.

remedies for

<sup>(</sup>n) Loughborough v. Curzon, L. R. 16 Q. B. D. 565; 55 L. J. M. 122. (o) The Queen v. Farrer, L. B. 1 Q. B. 558; 35 L. J. M. 210; The Queen v. Heanor, 6 Q. B. 745. See Illingworth v. Bulmer Highway Board, 52 L. J. Q. B. 680.

Order of county authority to repair.

1878, s. 10, providing that where complaint is made to the county authority that a highway authority has made default in maintaining or repairing any of the highways within their jurisdiction, the county authority, after due inquiry and report by their surveyor, may make an order limiting a time for the performance of the duty of the highway authority; and if such duty is not performed by the time limited, the county authority may appoint some person to perform such duty, and order that the expenses shall be paid by the authority in default. If the highway authority give notice that they decline to comply with the order until their liability has been determined by a jury, the county authority may direct an indictment to be preferred against the highway authority to try the liability (p). seems that this remedy does not supersede the former statutory remedies; and, from the construction put upon the former enactments, that it only applies to admitted highways, and that there is no jurisdiction if the existence of the highway is denied (q). Under the Local Government Act, 1888, s. 3, the powers of the county authority to the same effect are vested in the county council (r).

Indictment for nuisance.

The public remedy for a nuisance upon a highway, other than mere non-repair, is by indictment; the placing or causing a nuisance upon a highway being a misdemeanour at common law punishable by fine and imprisonment. Repeated indictments may be brought for a continued nuisance on a highway; and if necessary the judgment of the Court may order that a nuisance still existing shall be abated (s). The indictment being upon a criminal charge, there can be no new trial after an acquittal or conviction; but the Court may stay the judgment to give opportunity

<sup>(</sup>p) The Queen v. Wakefield, L. R. 20 Q. B. D. 810; 57 L. J. M. 52; ante, p. 539.

<sup>(</sup>q) Per cur. Loughborough H. B. v. Curzon, L. R. 16 Q. B. D. 568, 573; 55 L. J. M. 122; ante, p. 541.

<sup>(</sup>r) See ante, p. 535. (s) The King v. Pappineau, Stra. 686; The King v. Stead, 8 T. R. 142; see The King v. Incledon, 13 East, 164.

to prefer a fresh indictment (t).—Application may also be made to the Court by information in the name of the Attorney-General, as plaintiff on behalf of the public, for an injunction to restrain a nuisance or a threatened nuisance (u).

Any encroachment upon, or obstruction of a highway Nuisances constitutes a nuisance that may be subject of indictment; ways. but whether nuisance or not is a question of fact, and a jury may find the nuisance charged so inappreciable as not to render the defendant criminally liable (v). A nuisance on a highway cannot be justified upon the ground that the detriment to some of the public is counter-balanced by advantages to others; or that on the whole it is beneficial to the public in general (w).—The following nuisances upon highways have been held to be indictable: placing a gate upon a highway, although not locked (x).—Ploughing up an ancient foot-path; but in such cases the way may have been originally dedicated subject to the gate, or to the right of ploughing (y).—Using a highway in an unreasonable manner, as for depositing goods; or for standing carriages for an unreasonable time or for other purposes than reasonable traffic (z). "The building of a house in a larger manner than it was before whereby the street became darker is not any public nuisance by reason of the darkening," for which an indictment could be maintained (a). Collecting crowds on a highway to the obstruction of the

passage of the public is a nuisance; and a person is

<sup>(</sup>t) The Queen v. Russell, 3 E. & B. 943; 23 L. J. M. 173; The Queen v. Johnson, 2 E. & E. 613; 29 L. J. M. 133; The Queen v. Chorley, 12 Q. B. 515; The Queen v. Duncan, L. R. 7 Q. B. D. 198; 50 L. J. M. 95 See aute p. 539 50 L. J. M. 95. See ante, p. 539. (u) Att.-Gen. v. Shrewsbury, L. R. 21 C. D. 752; 57 L. J. C. 746. See Wallasey Local Board v. Gracey, L. R. 36 C. D. 593.

<sup>(</sup>v) The King v. Tindall, 6 A. & E. 143; The Queen v. Russell, 3 E.

<sup>&</sup>amp; B. 942; 23 L. J. M. 173.

<sup>(</sup>w) The King v. Ward, 4 A. & E. 384; Att.-Gen. v. Terry, L. R. 9 Ch. 423; disapproving The King v. Russell, 6 B. & C. 566.

<sup>(</sup>x) James v. Hayward, Cro. Car. 184.

<sup>(</sup>y) See ante, p. 511. (z) Ante, p. 499; Wilkins v. Day, L. R. 12 Q. B. D. 110; Harris v. Mobbs, L. R. 3 Ex. D. 268. (a) Holt, C. J., The King v. Webb, 1 L. Raym. 737.

responsible for causing such obstruction, though he himself remains on private ground (a).

Action for nuisance.

It is a principle of law that where an indictment will lie for a public nuisance there is no remedy by action, except for special or particular private damage sustained from it. Therefore in cases of nuisance upon a highway a person who is merely hindered from using the way in common with the rest of the public must proceed by indictment. But if he sustain some special damage to himself or to his property, which is not common to others, as by himself, or his horse and carriage, being thrown down, he has an action to recover that damage against the person who caused the nuisance (b). Local highway authorities have no greater power in this respect than a private person; they may proceed by indictment, or by information in the name of the Attorney-General on behalf of the public for an injunction to restrain the nuisance; but they cannot bring an action in their own name, except for some special and particular damage caused to them by the nuisance (c).—The plaintiff in such action must allege and prove some direct, particular and substantial damage, different from that sustained by the public in general from the destruction of the passage; as, that the sale of goods was lost, or that goods were deteriorated, by obstruction of the carriage (d); that additional expense was incurred in carrying goods by another way (e); that the plaintiff was prevented by the obstruction from carrying his corn, which became damaged

Special damage.

 <sup>(</sup>a) Horner v. Cadman, 55 L. J.
 M. 110; Back v. Holmes, 57 L. J.
 M. 37; ante, p. 495; and see post,

<sup>(</sup>b) Co. Lit. 56 a; Iveson v. Moore, 1 L. Raym. 486; as cited and explained in Soltau v. De Held, 2 Sim. N. S. 145; Erle, J., Ricket v. Metropolitan Ry., 5 B. & S. 161; 34

L. J. Q. B. 259; Benjamin v. Storr, L. R. 9 C. P. 400; 43 L. J. C. P. 162.

<sup>(</sup>c) Wallasey Local Board v. Gracey, L. R. 36 C. D. 593.

<sup>(</sup>d) Ireson v. Moore, 1 L. Raym. 486; 12 Mod. 262.

<sup>(</sup>e) Rose v. Miles, 4 M. & S. 101; Greasly v. Codling, 2 Bing. 263.

by rain (f); that carts and horses were kept standing an unreasonable time before his business premises, whereby the premises were rendered dark and unwholesome, and the access obstructed, to the loss of customers and material diminution of his business (q). But it is not sufficient for the plaintiff to prove merely that he was delayed, in common with all other persons using the way, by being obliged either to remove the obstruction, or to go by a longer way (h).—The action will lie against a landlord who lets premises with a public nuisance, as well as against the lessee who continues the nuisance (i).

An action for special damage will lie against the sur- Action veyor of highways, or the highway authority appointed as surveyor; surveyor of highways by statute, in respect of an actual nuisance or obstruction caused by them, or by persons in their employment. Thus a local board, as surveyor of highways, was held liable for damage sustained by a person falling over a heap of stones placed in the highway by their servants (i).—Local boards may also be liable for against damages caused by the defective and dangerous state of local board. sewers, watercourses, gratings, traps, and any other artificial constructions vested in them in their various capacities, which are placed or left in the highway so as to be a nuisance to the public (k).

The same principle applies to the abatement of a nuis- Abatement ance by act of the party. "An individual who is only of nuisance. injured as one of the public can no more proceed to abate than he can bring an action." But "a public nuisance becomes a private one to him who is specially and in some

<sup>(</sup>f) Maynell v. Saltmarsh, 1 Keb. 847.

<sup>(</sup>g) Benjamin v. Storr, L. R. 9 C. P. 400; 43 L. J. C. P. 162; Fritz v. Hobson, L. R. 14 C. D. 542; 49 L. J. C. 321.

<sup>(</sup>h) Winterbotham v. Derby, L. R. 2 Ex. 316; 36 L. J. Ex. 194. (i) Sandford v. Clarke, L. R. 21 Q. B. D. 398.

<sup>(</sup>j) Foreman v. Canterbury, L. R. 6 Q. B. 214; 40 L. J. Q. B. 138.

<sup>(</sup>k) White v. Hindley Loc. Board, L. R. 10 Q. B. 219; 44 L. J. Q. B. 114; Blackmore v. Mile End, L. R. 9 Q. B. D. 451; 51 L. J. Q. B. 496; Kent v. Worthing Loc. Board, L. R. 10 Q. B. D. 118; 52 L. J. Q. B. 77; Bathurst v. Macpherson, L. R. 4 Ap. Ca. 256. As to tram-ways, see Howitt v. Nottingham Tramway Co., L. R. 12 Q. B. D. 16; 53 L. J. Q. B. 21.

particular way inconvenienced thereby, as in the case of a gate across a highway which prevents a traveller from passing, and which he may therefore throw down "(k). A person can abate an obstruction to a way only when it is necessary for him to use the part of the way that is obstructed; he is not justified in destroying the obstruction, if he can conveniently pass without doing so (l).

Summary remedies, penalties for wilful obstruction.

Summary remedies against nuisances are given by the Highway Act, 1835, 5 & 6 Will. IV. c. 50:—Sect. 72 imposes a penalty, if any person shall do any of the specified acts of injury, damage, or annoyance upon a highway, which are particularly mentioned therein, or in general terms, "if any person shall in any way wilfully obstruct the free passage of any highway." Omitting to remove an obstruction may be a wilful obstruction within this section; as where a wall fell into the highway and the owner after notice left it there (m). And for a surveyor of highways in repairing a road to leave stones upon it at night insufficiently fenced and lighted was held to be within the section (n). But suffering trees to grow over the adjacent highway was held not to be a wilful obstruction within the section; though it may be matter of indictment (o). A crowd of persons standing upon a highway, or upon any part of a highway, are an obstruction to the free passage; and a person collecting or causing such a crowd may be convicted of a wilful obstruction, and though he was not himself upon the highway (p). person who being upon private ground adjoining a high-

<sup>(</sup>k) Per cur. Mayor of Colchester v. Brooke, 7 Q. B. 377; Jessel, M. R., Bagshaw v. Buxton Local Board, L. R. 1 C. D. 224; 45 L. J. C. 260; James v. Hayward, Cro. Car. 184. (l) Bateman v. Bluck, 18 Q. B. 870; 21 L. J. Q. B. 406; Dimes v. Petley, 15 Q. B. 276; 19 L. J. Q. B. 449; Arnold v. Holbrook, L. R. 8 Q. B. 96; 42 L. J. Q. B. 80.

<sup>(</sup>m) Gully v. Smith, L. R. 12 Q. B. D. 121; 53 L. J. M. 35. (n) Fearnley v. Ormsby, L. R. 4 C. P. D. 136.

<sup>(</sup>o) Walker v. Horner, L. R. 1 Q. B. D. 4; 45 L. J. M. 34, Cockburn, C. J., dissentiente.

 <sup>(</sup>p) Horner v. Cadman, 55 L. J.
 M. 110; Back v. Holmes, 57 L. J.
 M. 37. See ante, p. 495.

way collects a crowd upon the highway is guilty of the obstruction caused by it (q). The police or any person may prosecute the offender, notwithstanding there is a vestry or local board having control over the highway (r).

The Towns Police Clauses Act, 1847, 10 & 11 Vict. c. 89, which is incorporated in the Public Health Act, 1875, "with respect (inter alia) to obstructions and nuisances in the streets, for the purpose of regulating such matters in urban districts," provides by s. 28 that "every person who in any street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences shall be liable to a penalty not exceeding forty shillings or may be committed to prison for not exceeding fourteen days." The Act proceeds to enumerate the various offences, and amongst them "by means of any cart, carriage, truck or barrow, or any animal, or other means wilfully causes any obstruction in any public footpath or other public thoroughfare."

The Highway Act, 1864, 27 & 28 Vict. c. 101, s. 51, Encroachimposes a penalty, "If any person shall encroach by ment on sides of highway. making any building, or pit, or hedge, ditch or other fence, or by placing any dung, compost, or other material for dressing land, or any rubbish, on the side or sides of any carriage way or cart way within fifteen feet of the centre thereof, or by removing any soil or turf from the side or sides of any carriage way or cart way,-notwithstanding that the whole space of fifteen feet from the centre of such carriage way or cart way has not been maintained with stones or other materials used in forming highways" (s).-The "sides" intended by this enactment are part of the highway, not including any space beyond the actual limits of the highway, though such space may be within fifteen feet of the centre of carriage way. If

<sup>(</sup>q) Back v. Holmes, 57 L. J. M. 37.

<sup>(</sup>r) Back v. Holmes, supra.

<sup>(</sup>s) See the former enactment against encroachment of the Highway Act, 1835, s. 69.

the highway extends beyond, the statute gives the special protection of a penalty against encroachment only to so much as is within fifteen feet of the centre; but if the highway does not extend so far, the statute has no application beyond the width of the highway (t).

Removal of nuisance.

By the Highway Act, 1835, s. 73, "If any matter or thing whatsoever shall be laid upon any highway so as to be a nuisance, and shall not, after notice given by the surveyor, be forthwith removed, it shall be lawful for the surveyor, by order in writing from any one justice, to clear the said highway by removing the said matter or thing, and to dispose of the same, and to apply the proceeds towards the repairs of the highway"; at the expense of the person who laid the same upon the highway.—Upon an application to justices under this section, they have to determine the question whether there is a highway or not; and their jurisdiction is not ousted where the party charged is the owner of the land and denies that there is a highway over it (u). The sections 94, 95, enabling justices, when the liability to repair is denied, to order an indictment, apply only to admitted highways, and if there is a bona fide dispute as to the existence of a highway, they have no jurisdiction (v).—It seems that after it has been judicially decided, upon an indictment or other legal proceedings, that there is an obstruction or nuisance upon a highway, the surveyor or highway authority may lawfully remove the nuisance, although no special statutory authority be given for that purpose; and the Court will not restrain them in so doing merely upon that ground (w). A conviction by justices of an encroachment on a highway justifies the surveyor

<sup>(</sup>t) Easton v. Richmond Highway Board, L. R. 7 Q. B. 69; 41 L. J. M. 25. See Lowen v. Kaye, 4 B. & C. 3; and see Tutill v. West Ham, L. R. 8 C. P. 447. As to limits of highway, see ante, p. 493. (u) Williams v. Adams, 2 B. & S. 312; 31 L. J. M. 109. See The

Queen v. Young, 52 L. J. M. 55. (r) The Queen v. Farrar, L. R. 1 Q. B. 558; 35 L. J. M. 210. See

ante, p. 541. (w) Jessel, M. R., Bagshaw v. Buxton Local Board, L. R. 1 C. D. 220; 45 L. J. C. 260.

customs.

in removing it, although the conviction may be wrong (x). But if a highway authority order the removal of a nuisance upon their own judgment, without a judicial decision, they do so at their own risk as to the facts of there being a nuisance and upon a highway; nor is the surveyor justified merely by the order of the authority (y).

## SECTION II. LOCAL CUSTOMS.

Local customs—custom and common law—custom and statute law custom and prescription-local usages of trade.

Usage as evidence of custom-immemorial usage-Prescription Act. Usage as of right.

Certainty of usage as to place—custom limited to locality—certainty of usage as to persons.

Certainty of usage as to the rights created.

Reasonableness of usage-usage against law-reasonable customsusage repugnant to ownership.

Customs to take profits of land-claims to profits by custom disallowed -profits subject to tolls or fees-customs of mining.

Customs to take profits by presumed Crown grant—no presumption of statute—customs under grant to corporation—customs supported as charitable uses.

Customs of manors—customary rights of copyhold tenants—freehold tenants-occupiers.

Custom is unwritten local law prevailing by usage in a Local certain district, as a town, or parish, or manor. By custom a local public or class of persons, as the inhabitants of a town or parish, may be entitled to have some use or quasi easement of land: as to have a way over certain land to church or market; or to hold a fair or market at a certain place; or to take water from a spring; or to have a watering place for cattle; or to have an exercise and recreation ground (a).

<sup>(</sup>x) Keane v. Reynolds, 2 E. & B. 748. (y) Mill v. Hawker, L. R. 10 Ex. 92; 44 L. J. Ex. 49. (a) See post, p. 559.

Custom and common law.

Custom or local law, so far as it prevails, displaces the common law, which is the general custom prevailing throughout the realm: consuetudo privat communem legem (b). "A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm" (c). The general custom of the realm or common law is judicially noticed and administered by the Courts; but local custom is not judicially noticed. Consequently it is necessary for a party who relies upon a local custom to plead it with particularity, and to prove it as pleaded, in order to displace the common law. For instance, the customs of manors prevailing generally throughout the realm is common law, presumptively applicable in all manors; but the special custom of a particular manor, in variance from the general custom, must be alleged and proved by the party asserting it (d).—General public rights also differ from the local public rights which exist by custom, in that the former are attended with the remedy by indictment, a proceeding in the name of the Crown on behalf of the public; as in the case of an obstruction of a highway. A private action does not lie for a public right, except in the case of special and particular damage happening to a person, different from the rest of the public (e). But an indictment does not lie on behalf of a class or section of the public for an obstruction of a local right, which does not affect the public in general; and therefore the only remedy is by action, which any person who is within the custom may bring in respect of his interest in the right, and irrespective of special or particular damage sustained by him individually. Thus, in a case where it appeared that the inhabitants of a

<sup>(</sup>b) Lit. s. 169. (c) Per cur. Lockwood v. Wood, 6 Q. B. 64.

<sup>(</sup>d) 9 Co. 75 b, Combe's case; Portland v. Hill, L. R. 2 Eq. 765; 35 L. J. C. 439. (e) See ante, p. 544.

certain district had by custom a watering place for their cattle, it was adjudged that any inhabitant might have an action for an obstruction; for otherwise they would be without remedy, because such an obstruction is not indictable as a public nuisance (f).

No custom, whether local or general, can be alleged Custom and against an Act of Parliament, because that is matter of statute law. record. But an Act which is merely declaratory of the common law is generally construed as having no greater force or effect than the common law which it confirms; therefore a custom may be alleged against it. And an Act which is in affirmative terms only is generally construed as not taking away either common law or local customs (g).

Custom and prescription are both founded on usage; but Custom and custom differs from prescription in connecting the right prescription. with the land instead of with the person. "In the common law a prescription, which is personal, is always made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politic or corporate and their predecessors. A custom, which is local, is alleged in no person, but laid within some manor or other place "(h). -Also, prescription in deriving title from a person necessarily implies an original grant to some person from whom the title is derived; and "no prescription can have had a legal origin, where no grant could have been made to support it." But custom in assigning certain uses of the land is subject to no similar restriction. It gives rights to persons as belonging to a class determined by their connection with the place, as the inhabitants of a town or parish; and to persons so described, being incapable to purchase land, no grant could be made (i).—It should be observed that the

<sup>(</sup>f) Westbury v. Powell, cited in Fineux v. Hovenden, Cro. Éliz. 664; and in Co. Lit. 56 a; Harrop v. Hirst, L. R. 4 Ex. 43; 38 L. J.

<sup>(</sup>g) Co. Lit. 113 a, 115 a; 2 Co. Inst. 200.

<sup>(</sup>h) Co. Lit. 113 b; 4 Co. 32 α; 6 Co. 60 b, Gateward's case. See ante, p. 288. Westbury, L. C., Hanmer v. Chance, 34 L. J. C. 416. (i) Co. Lit. 3 a; per cur. Lock-wood v. Wood, 6 Q. B. 64.

term "prescription" is sometimes used in a general meaning of any title acquired by long usage, whether an individual title founded on grant, or the title of a class of persons by custom; and it is necessary to examine the context and circumstances in order to ascertain the title designated as prescriptive (j).

Local usages of trade.

The various local usages of particular trades and businesses, which control or modify contracts and dealings in the place where they prevail, are not customs, properly so called, as having the force of local law. They derive their binding effect only from the parties contracting with reference to the local usage of trade, and thereby incorporating the usage into their agreement, unless they express an intention to the contrary. Such usages need not, like customs, be fixed and immemorial; it is sufficient if they are certain and presumptively known to the parties at the time of contracting. Thus, "an agricultural custom need not have subsisted from time immemorial; but it must have subsisted for a reasonable length of time, and it must be adequately proved" (k).

Usage, as basis of custom.

The usage necessary to support a custom must have continued from time immemorial, without interruption, and as of right; it must be certain as to the place, and as to the persons; and it must be certain and reasonable as to the subject-matter, or rights created (1).

Immemorial usage.

Usage from time immemorial, as in the case of prescription, dates from the beginning of the reign of King Richard I., A.D. 1189 (m). But proof of modern usage is presumptive evidence of indefinite earlier existence; and a regular usage for twenty years, unexplained and uncontradicted, is held to be sufficient evidence for a jury to

(m) Sée ante, p. 283.

<sup>(</sup>j) See per cur. Lockwood v. Wood,6 Q. B. 66.

<sup>(</sup>k) Jessel, M. R., Tucker v. Linger, L. R. 21 C. D. 34; 52 L. J. C. 941. See Legh v. Hewitt, 4 East, 159; Bradburn v. Foley, L. R. 3

C. P. D. 129; 47 L. J. C. P. 331.
See Leake on Contracts, 2nd ed.,
p. 196.

<sup>(</sup>l) Co. Lit. 110 b; per cur. Tyson v. Smith, 9 A. & E. 421.

find the existence of an immemorial custom (n). presumption from modern usage may be rebutted by proof of the origin or non-existence of the custom within the time of legal memory. Thus it was held that the claim of a custom to erect stalls at the Statute sessions appointed for the hiring of labourers could not be supported; because Statute sessions were first established in the reign of Edward III., within legal memory (o). And it was held that a custom to take toll upon goods sold in a market did not extend to sales by sample, because sales by sample, which are contracts for delivery of goods out of the market, are of modern introduction, and contrary to the origin and intention of markets (p). Upon this principle the production of a customary of a manor, compiled within the period of legal memory, omitting the custom in question, was held to be conclusive against its prior existence (q).— A presumption of continuance may be made prospectively as well as retrospectively; so that a usage proved up to a certain date is presumed to continue until some evidence appears to the contrary; for mere non-user, without interruption of the right, does not affect the validity of a custom. Thus a custom found by a jury to have existed till the year 1689, there being no evidence of its abolition, was held to continue an existing custom at the date of the inquiry (r).

Customs are not within the Prescription Act, "for Prescription shortening the time of prescription," which provides, s. 2, Act. that no claim to an easement, after an enjoyment of twenty years, shall be defeated by showing only that it was first enjoyed at any time prior to such period of twenty years; for the section is construed to apply only to easements strictly so called, which are claimed in right of a dominant

<sup>(</sup>n) The King v. Joliffe, 2 B. & C. 54; see Shepherd v. Payne, 16 C. B. N. S. 132; 33 L. J. C. P. 158.
(o) Simpson v. Wells, L. R. 7 Q. B. 214; 41 L. J. M. 105.
(p) Hill v. Smith, 4 Taunt. 520.

<sup>(</sup>g) Anglesey v. Hatherton, 10 M. & W. 218; Portland v. Hill, L. R. 2 Eq. 765; 35 L. J. C. 439. (r) Scales v. Key, 11 A. & E.

over a servient tenement (r). Nor are customs within sect. 6 of the same Act, which provides that "no presumption shall be allowed in support of any claim, upon proof of the enjoyment of the right claimed for any less period of time than for such period mentioned in the Act as may be applicable to the case" (s).

Usage as of right.

"Equally in the case of custom as in that of prescription, long enjoyment, in order to establish a right, must have been 'as of right'; and therefore neither by violence, nor by stealth, nor by leave asked from time to time" (t). Thus a claim of custom against the owners of a fishery, for the inhabitants of the place to have a licence to fish upon payment of a customary fee, was held bad; because, the . fishing being by licence, there had been no such enjoyment as of right as would support a custom (u).—An immemorial usage proved in fact must be presumed to be rightful, if it be reasonably possible for it to have had a legal origin; but if such presumption be contradicted by the facts proved, or be otherwise unreasonable, the proved usage may be accounted for by the forbearance of the servient owner, who may have allowed the usage without interruption knowing that it could not grow into a right; until some change of circumstances, such as an extension of the usage, or an increase of the value of the property affected, may make it necessary for him to resist (v).

Certainty of usage as to place.

The usage must be defined with certainty as to the place where it prevails; as a county, a parish, a manor, a town or borough. "A custom cannot be alleged generally within the kingdom of England; for that is the common

<sup>(</sup>r) Mounsey v. Ismay, 3 H. & C. 486; 34 L. J. Ex. 52. See ante, p. 286.

<sup>(</sup>s) Hanmer v. Chance, 4 D. J. & S. 626; 34 L. J. C. 413. See ante, p. 301.

<sup>(</sup>t) See ante, p. 287. (u) Mills v. Colchester, L. R. 2

C. P. 486; 36 L. J. C. P. 217. And see ante, p. 292.

<sup>(</sup>v) Per cur. Saltash v. Goodman, L. R. 5 C. P. D. 451; Goodman v. Saltash, L. R. 7 Ap. Ca. 633; 52 L. J. Q. B. 193; Rivers v. Adams, L. R. 3 Ex. D. 372; 48 L. J. Ex. 47.

law"(w). A custom extending over the whole kingdom, though limited to particular persons, is a general custom or common law; as the custom of merchants, and of innkeepers, and of carriers, and other general customs prevailing throughout the realm. "It has not been usual for a long time to allude to such customs in pleadings, because no proof is required of their existence; they are considered as adopted into the common law, and as such are recognized by the judges without any evidence. These are called customs because they only apply to particular descriptions of persons, and do not affect all the subjects of the realm; but if they govern all persons belonging to the classes to which they relate, they are to be considered as public laws "(x).—Custom has no application beyond its local Custom limits; there cannot be a custom in one place giving limited by locality. any right or duty in another place (y). Thus a copyholder cannot claim by custom of the manor to have common in land which is not parcel of the manor; but he must prescribe for such common in the name of the lord (z). And there cannot be a custom in a parish for the inhabitants to repair the roads in another parish, or to have their roads repaired by another parish (a). So it was held that an alleged custom for the inhabitants of a parish to exercise horses in a place beyond the limits of the parish could not be supported; because "a custom could not be claimed on behalf of the inhabitants of one place to be exercised and enjoyed in another and different place" (b). A claim of custom cannot be made in respect of a separate close or tenement over another close, as that the occupiers of the one have immemorially used a way over the other; such right must be claimed by prescription in the owner of the fee, as an appurtenance of the tene-

<sup>(</sup>w) Co. Lit. 110 b.
(x) Per cur. Gifford v. Yarborough,

<sup>5</sup> Bing. 164.
(y) 6 Co. 61 a, Gateward's case; per cur. The King v. Ecclesfield, 1 B. & Ald. 360.

<sup>(</sup>z) Foiston v. Crachrood, 4 Co.

<sup>(</sup>a) Dawson v. Willoughby, 5 B. & S. 920; 34 L. J. M. 37; The Quern v. Ardsley, L. R. 3 Q. B. D. 255; 47 L. J. M. 65.
(b) Sowerby v. Coleman, L. R. 2 Ex. 96; 36 L. J. Ex. 57.

ment; or it might be claimed by the occupier as being one of inhabitants all of whom are entitled by custom to use the way (c).

Certainty of usage as to persons.

The usage must also define and limit with certainty the persons privileged or affected by it. "A custom which would comprehend within it all the subjects of the Crown would be bad, on the ground of its amounting to the common law" (d). Thus, a custom alleged "for all persons, for the time being, being in a parish," to have the liberty of playing at lawful games upon a certain close, was held bad; because "customs must in their nature be confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom;" but such a custom claimed for all the inhabitants of a parish would be good (e). The word "inhabitants" is sufficiently restrictive; but it has in itself no further definite meaning, and depends for explanation upon the evidence of the usage (f). "It seems that a grant to the inhabitants of a parish means the inhabitants of houses within the parish, and must be restricted to houses lawfully erected (g). A custom for the victuallers attending a fair held at a certain time and place to erect booths for the purpose of their trade was held good, because the generality of the persons was sufficiently limited by the conditions of being victuallers, and of attending the fair (h). But a claim of a custom, for "poor householders" residing within a township to cut and carry away dead wood, was held void for uncertainty; it being impossible to ascertain who was entitled under the description of "poor" (i). And for the same reason it was held that a custom for "poor

<sup>(</sup>c) Baker v. Brereman, Cro. Car.

<sup>418.</sup> See ante, p. 288.
(d) Per cur. Tyson v. Smith, 9
A. & E. 423.

<sup>(</sup>e) Fitch v. Rawling, 2 H. Bl.

<sup>(</sup>f) Per cur. The King v. Mashiter, 6 A. & E. 153; The King v. Davie, 6 A. & E. 374.

<sup>(</sup>g) Jessel, M. R., Chilton v. Corp. London, L. R. 7 C. D. 744; 47 L. J. C. 439.

<sup>(</sup>h) Tyson v. Smith, 9 A. & E. 423. See Elwood v. Bullock, 6 Q. B.

<sup>(</sup>i) Selby v. Robinson, 2 T. R. 758. See post, p. 567.

parishioners" to glean in the harvest field could not be maintained (i).

The usage must also define with certainty the rights or Certainty of privileges created by the custom; but it is sufficient if the usage as the privileges created by the custom; but it is sufficient if the usage as the privileges created by the custom; effect of the usage can be ascertained with reasonable cer- created. tainty, applying the maxim, certum est quod certum reddi potest. Upon this principle a custom to take a reasonable fee or toll is sufficiently certain, though the sum is not fixed by the usage, but is varied from time to time according to the value of money and the circumstances of the consideration rendered; and "what shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the judges of the law, if it come judicially before them "(k). Customary rights to be exercised upon land between the removal and re-sowing of the crops are sufficiently certain as to times of beginning and ending, which can be ascertained by all; as in the case of common fields and lammas lands (l). An alleged custom of a manor for all tenants of collieries to sink pits and to place the earth and rubbish in heaps upon the land "near" to the pits, was held void for uncertainty, both as to the land to be covered and the time it should remain so (m).

usage as to

The usage must be reasonable; or rather, it must not Reasonablebe unreasonable; "for whatsoever is not against reason may well be admitted and allowed" (n). And "if no reason can be given for the beginning of a custom, yet non sequitur this custom to be for this cause unreasonable,

ness of usage.

<sup>(</sup>j) Steel v. Houghton, 1 H. Bl.

<sup>51. (</sup>k) Gard v. Callard, 6 M. & S. 72, citing 2 Co. Inst. 222; per cur. Mills v. Colchester, L. R. 2 C. P. 485; 37 L. J. C. P. 278; S. C., L. R. 3 C. P. 575. See Wilson v. Hoare, 10 A. & E. 236; Laybourn v. Crisp, 4 M. & W. 330.

<sup>(</sup>l) Jessel, M. R., Baylis v. Tyssen-Amhurst, L. R. 6 C. D. 509; 46 L. J. C. 718. See ante, p. 340.
(n) Broadbent v. Wilks, Willes, 360; 1 Wils. 63. See Rogers v. Taylor, 1 H. & N. 706; 26 L. J. Ex. 205.

<sup>(</sup>n) Lit. s. 80; Co. Lit. 62 a; per cur. The King v. Ecclesfield, 1 B. & Ald. 357.

and against reason at the beginning of it" (o). "When it is said that a custom is void, because it is unreasonable, nothing more is really meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence and not from any right conferred in ancient times" (p). Whether an alleged custom is inadmissible in law as being unreasonable is a question of law for the Court to decide upon the facts found (q).

Usage against law.

"A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law; for 'consuctudo ex certa causa rationabili usitata privat communem legem,' as the custom of gavelkind and borough English which are directly contrary to the law of descent, or the custom of Kent which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth; as the custom to turn the plough upon the headland of another, in favour of husbandry; or to dry nets on the land of another in favour of fishing. But, on the other hand a custom that is contrary to the public good or prejudicial to the many and beneficial only to some particular person is repugnant to the law of reason; for it could not have had a reasonable commencement" (r); as a custom alleged for the inhabitants of a town to maintain a nuisance upon a highway (s).—But "no custom or prescription can take away the force of an Act of Parliament" (t).

(o) Coke, C. J., Hix v. Gardener, 2 Bulstr. 195.

cur. Tyson v. Smith, 9 A. & E. 421; adopted in Bradburn v. Foley, L. R. 3 C. P. D. 135; 47 L. J. C. P. 221

<sup>(</sup>p) Ld. Cranworth, Marq. Salisbury v. Gladstone, 9 H. L. 692; Hatherley, L. C., Warrick v. Queen's Coll., L. R. 6 Ch. 722; 40 L. J. C. 780. "Consuctudo contra rationem introducta potius usurpatio quam consuctudo appellari debet." Co. Lit. 113 a.

<sup>(</sup>q) Co. Lit. 56 b, 59 b; per cur. Bell v. Wardell, Willes, 204; per

<sup>(</sup>r) Per cur. Tyson v. Smith, 9 A. & E. 421; and see Abbott, C. J., The King v. Joliffe, 2 B. & C. 59. See per cur. The King v. Mayor of London, 9 B. & C. 29.

<sup>(</sup>s) Fowler v. Sanders, Cro. Jac. 446.

<sup>(</sup>t) Co. Lit. 113a; see ante, p. 551.

According to the above principles the following customs Reasonable have been allowed:—A custom for the inhabitants of a town to walk or ride for health and exercise over a private close of land was supported as reasonable and valid (u), also to play all kinds of lawful games upon a private close (v), or to erect a maypole and dance for recreation (w); also a custom for the inhabitants of a parish to use a "village green" for exercise and recreation and for all lawful sports and pastimes (x).—A custom alleged for the inhabitants of a town to walk and ride over a close of arable land for health and exercise at "all seasonable times in the year," was held reasonable and valid, being construed by the Court to mean all times seasonable for the land, excluding the season when the corn was growing (y). And a custom alleged for inhabitants to enjoy any lawful recreation upon certain land "at all times of the year" was held good, because impliedly limited by judicial construction to seasonable times (z). The claim of a custom for the inhabitants of a city to hold horse races upon a close of land on a certain day in every year was held to be maintainable, whether the day was in fact seasonable or not; for the usage being immemorial, the validity must be determined with reference to the state of the land at its origin, and not at the time of pleading (a).—"The right to perambulate parochial boundaries, to enter private property for that purpose, and to remove obstructions that might prevent this from being done prevails as a notorious custom in all parts of England; but a custom on that

<sup>(</sup>u) Bell v. Wardell, Willes, 202. (v) Fitch v. Rawling, 2 H. Bl. 394. See Millechamp v. Johnson, Willes, 205 b.

<sup>(</sup>w) Abbot v. Weekly, 1 Lev. 176; Hall v. Nottingham, L. R. 1 Ex. D. 1; 45 L. J. Ex. 50.

<sup>(</sup>x) Forbes v. Eccles. Commiss., L. R. 15 Eq. 51; 42 L. J. C. 97. See Hammerton v. Honey, 24 W. R. 603; cited L. R. 17 C. D. 598. And see the Commons Act, 1876,

<sup>39 &</sup>amp; 40 Vict. c. 56, as to the allotment of recreation grounds, and the preservation of public rights over commons.

<sup>(</sup>y) Bell v. Wardell, Willes, 202. See Sowerby v. Coleman, L. R. 2 Ex. 96; 36 L. J. Ex. 59.

<sup>(</sup>z) Hall v. Nottingham, L. R. 1 Ex. D. 1; 45 L. J. Ex. 50.

<sup>(</sup>a) Mounsey v. Ismay, 1 H. & C. 729; 32 L. J. Ex. 94.

occasion to enter a particular house which is neither upon the boundary line, nor in any manner wanted in the course of the perambulation, cannot be supported "(a).

Usage repugnant to ownership. A usage which tends to deprive the owner of all beneficial use of his property is repugnant and unreasonable, and therefore cannot be supported as a legal custom (b). For this reason the claim of a custom could not be supported, for the inhabitants of a parish to exercise and train horses upon land, without limit as to the number of horses, or as to the time of year (c). So, a custom claimed in a manor for working collieries without making compensation for damage to the surface or buildings (d). And a custom claimed to work minerals by sinking pits and laying the earth and rubbish on the land near to the pits for an unlimited time, was held to be unreasonable as it might deprive the tenant of the whole benefit of the land (e).

Customs to take profits of land.

It is a general rule of law that a claim by custom to a profit à prendre, that is, to take some material profit from the land is unreasonable and void; because the effect of the perpetual use of such a custom by an indefinite number of persons, as all the inhabitants of a place, would necessarily tend to the destruction of the subject-matter of the custom. Uses of the nature of easements are the only rights over land admissible as the subject of custom, strictly so called. "A custom that every inhabitant of such a town shall have a way over such land either to the church or market, &c. is good; for it is but an easement and no profit" (f).—The prescriptive title to a profit à prendre differs from a custom in being vested in a certain person by whom it may be released or extinguished; whereas "a

<sup>(</sup>a) Taylor v. Devey, 7 A. & E. 409; Goodday v. Michell, Cro. Eliz. 441.

<sup>(</sup>b) Per. cur. Hilton v. Granville,5 Q. B. 730.

<sup>(</sup>c) Sowerby v. Coleman, L. R. 2 Ex. 98; 36 L. J. Ex. 59.

<sup>(</sup>d) Hilton v. Granville, supra.

<sup>(</sup>e) Broadbent v. Wilkes, Willes, 360; Wilkes v. Broadbent, 1 Wils. 63: ante. p. 557.

<sup>63;</sup> ante, p. 557. (f) 6 Co. 60 b, Gateward's case; per cur. Race v. Ward, 4 E. & B. 713; 24 L. J. Q. B. 153; and Rivers v. Adams, L. R. 3 Ex. D. 364; 48 L. J. Ex. 47.

custom has no certain person who can extinguish it, for as soon as he who releases it removes, the new inhabitant shall have it "(g). Also a prescriptive title in a person is founded upon grant, and therefore extends to whatever is grantable (h).

Under the above rule the following claims of customs Claims to have been disallowed: a custom for the inhabitants of a profits by town or parish to take common of pasture (i); a custom disallowed. for the inhabitants of a parish to cut underwood or lopwood for fuel (j); a custom for the inhabitants of the district of an ancient forest to cut and carry away brake, fern, heather, and litter (k); a custom to glean in the harvest field (1); a custom for the householders of a parish to cut and pick up dead wood and carry it away for fuel; but "it might have been otherwise if the claimant could have stated that he was possessed of a certain ancient tenement, and so prescribed in a que estate." (m). crown grant for the inhabitants in a forest to gather dead sticks was allowed upon demurrer, because such a grant might possibly take effect by implied incorporation of the inhabitants for the purpose of the grant (n).—By the Claim to take same rule no claim can be made by custom to take minerals, stone or any part of the soil, from the land of another (o). A claim by inhabitants to enter a close of land to take sand drifted from the sea shore, was held bad, because the drifted sand had become part of the soil (p). A usage for the inhabitants of a parish of taking gravel out of another person's land for the purpose of repairing

minerals.

<sup>(</sup>g) 6 Co. 60a, Gateward's case; per cur. Att.-Gen. v. Mathias, 4 K. & J. 579; 27 L.J.C. 766. See ante, p. 355.

<sup>(</sup>h) See ante, p. 281.
(i) Gateward's case, 6 Co. 59 b;
Weekly v. Wildman, 1 Ld. Raym.

<sup>405;</sup> Grimstead v. Marlowe, 4 T. R.

<sup>(</sup>j) Rivers v. Adams, L. R. 3 Ex. D. 361; 48 L. J. Ex. 47; Chilton v. Corp. London, L. R. 7 C. D. 735; 47 L. J. C. 433.

<sup>(</sup>k) See De la Warr v. Miles, L. R.

<sup>17</sup> C. D. 535; 49 L. J. C. 490. (1) Steel v. Houghton, 1 H. Bl. 51; ante, p. 557.

<sup>11;</sup> ante, p. 591.
(m) Selby v. Robinson, 2 T. R.
758; ante, p. 551.
(n) Willingale v. Maitland, L. R.
3 Eq. 105; 36 L. J. C. 64; Chilton
v. Corp. London, L. R. 7 C. D. 735;
47 L. J. C. 433. Post, p. 565.
(a) Att.-Gen. v. Mathias, 27 L. J.

<sup>(</sup>p) Blewett v. Tregonning, 3 A. & E. 554.

the highway cannot be supported as a custom at common law, because it is a profit à prendre; nor can it give a prescriptive right, because the inhabitants, not being incorporated, are incapable of taking a grant (q). A usage of agriculture for the tenant to pick and carry away stones in the process of cultivation was held binding between landlord and tenant, in the absence of express agreement upon the matter; but such usage does not amount to a custom properly so called, nor is the subject a profit in alieno solo, but a profit of the demised premises (r).— A custom pleaded for all the inhabitants of a parish to angle and catch fish in a private water or river, was held bad, because it claimed a profit à prendre, and might lead to the destruction of the subject-matter to which it applied; "and a claim to angle for and catch the fish, without claiming a right to carry them away, would be equally destructive of the subject-matter, and bad" (s); nor can any right be acquired by usage for the public in general to fish in private waters or rivers, navigable or non-navigable (t). So a custom alleged for all the free inhabitants of a borough to dredge for oysters in a several fishery of the borough, was held bad (u); but a grant of the fishery of oysters to the corporate borough to be taken and enjoyed by the "free inhabitants" during certain times of the year, without stint, was held good, because a profit à prendre might pass to the borough by the grant, which might also prescribe the mode of enjoyment by the inhabi-Claim to take tants (v).—A custom for the inhabitants of a district to go upon a close of land to take water from a natural stream, spring, or well may be valid; because, flowing water being

water.

Claim to take fish.

<sup>· (</sup>q) Constable v. Nicholson, 14 C. B. N. S. 230; 32 L. J. C. P. 240. (r) Tucker v. Linger, L. R. 21 C. D. 34; 52 L. J. C. 941; ante, (s) Campbell, C. J., Bland v. Lipscombe, 4 E. & B. 713 (c); Lloyd v. Jones, 6 C. B. 81.

<sup>(</sup>t) Hudson v. McRac, 4 B. & S. 585; 33 L. J. M. 65; Hargreaves v. Diddums, L. R. 10 Q. B. 582;

<sup>44</sup> L. J. M. 17 ; Pearce v. Scotcher, L. R. 9 Q. B. D. 162; Neill v. Devonshire, L. R. 8 Ap. Ca. 135. See ante, p. 180.

<sup>(</sup>u) Saltash v. Goodman, L. R. 7 Q. B. D. 106; 50 L. J. Q. B. 508. (v) Goodman v. Saltash, L. R. 7 Ap. Ca. 633; 52 L. J. Q. B. 193. See Re Faversham Free Fishers, L. R. 36 C. D. 329; and see post, p. 566.

no part of the soil nor the subject of property, the right claimed is a mere easement and not a profit à prendre (w).

It seems that a custom for taking a profit in alieno solo Profits subor for an occupation of the soil may be valid, if supported or fees. by the consideration of a customary payment to the owner; as in the case of stallage at a customary fair for which a reasonable toll is payable (x). So with a custom to fish upon payment of a reasonable fee, which might, in favour of ancient enjoyment, be deemed a sufficient restriction on the one hand, and satisfaction or return for the profit taken on the other, to make the custom reasonable (y).

A custom of mining, subject to payment of toll, pre- Customs of vails in the county of Cornwall, which is known as tin mining. bounding. The custom is that any tinner, i.e., any person employing himself in tin mining, may acquire to himself the right of mining for tin in waste or uninclosed land, by marking out boundaries for his working, and obtaining possession from the Stannary Court. He is then entitled to work the mine, rendering toll tin, or a certain portion of the produce, to the owner of the soil. He is at the same time bound to work the mine, and cannot preserve or renew the right without working (z). Subject to the custom of bounding, "the ownership of a tin mine in Cornwall is in the owner of the freehold of the soil, ratione soli, by the common law of England, applicable to it as to any other mineral district in any other part of England" (a). The working of mines subject to the custom under the jurisdiction of the Stannary Court is now regulated by the Stannaries Acts, 1869, 32 & 33 Vict.

<sup>(</sup>w) Race v. Ward, 4 E. & B. 702; 24 L. J. Q. B. 153; Manning v. Wasdale, 5 A. & E. 758; Knight v. Woore, 3 Bing. N. C. 3; Smith v. Archibald, L. R. 5 Ap. Ca. 489; Harrop v. Hurst, L. R. 4 Ex. 43; 38 L. J. Ex. 1; ante, p. 331.

(x) Per cur. Tyson v. Smith, 9 A. & E. 425; Bennington v. Taylor, 2

Lutw. 1517.

<sup>(</sup>y) See Mills v. Colchester, L. R. 2 C. P. 484; 36 L. J. C. P. 216.
(z) Rogers v. Brenton, 10 Q. B. 26; Att.-Gen. v. Mathias, 4 K. & J. 579; 27 L. J. C. 766.

<sup>(</sup>a) Per cur. Rogers v. Brenton, 10 Q. B. 49; Case of Stannaries, 12 Co. 9.

c. 19; 1887, 50 & 51 Vict. c. 43. The custom of tin bounding further imports the easement of using any streams of water found within the bounds for washing the minerals, and for this purpose to divert the water into other streams, and to discharge refuse into the streams, though it tends to fill up the bed of the stream and cause an overflow (b). This right is paramount to the rights of others to the water, but does not prevent the acquisition and existence of other ordinary rights, unless in fact exercised adversely to them (c). The rights to water acquired by tin bounders enure for the benefit of the landowner, upon the mine being abandoned by the bounders and reverting to the landowner (d).—A like custom prevailed in the Forest of Dean, entitling free miners within the district, in order of priority of application, to have the grant of a gale or license from the crown. A gale entitled the miner to work mines of coal or iron or stone, conditional upon payment of rents, royalties and dues, and upon the proper opening and working of the gale; being subject to forfeiture for breach of the conditions (e). Rights under this custom are also now regulated by Statutes (f).—A custom of mining also prevailed in the county of Derby, giving paramount rights of working mines of lead under all lands within the district, which are now regulated by "The Derbyshire Mining Customs and Mineral Courts Act," 15 & 16 Vict. c. clxiii (q).

(b) Carlyon v. Lovering, 1 H. & N. 784; 26 L. J. Ex. 251.
(c) Gaved v. Martyn, 19 C. B. N. S. 732; 34 L. J. C. P. 353.
(d) Iriney v. Stocker, L. R. 1 Ch. 396; 35 L. J. C. 467.
(e) Re Brain, L. R. 18 Eq. 389; 44 L. J. C. 103; Morgan v. Craveshay, L. R. 5 H. L. 304; James v. The Queen, L. R. 5 C. D. 153; 43 L. J. C. 754; Rope v. Ragge-Irice, L. R. 1 Ex. D. 269; 45 L. J. Ex. 777; Brain v. Thomas, 50 L. J. Q. B. 662; Ellway v. Davis, L. R.

16 Eq. 294; 43 L. J. C. 75; James
v. Foung, L. R. 27 C. D. 652; 53
L. J. C. 798.

(f) The Dean Forest Mines Act, 1838, 1 & 2 Vict. c. 43; Amendment Act, 1861, 24 & 25 Vict. c. 40; Amendment Act, 1871, 34 & 35 Vict. c. 85. See Re Thomas, L. R. 21 Q. B. D. 380.

(g) See Wright v. Pitt, L. R. 12 Eq. 408; 40 L. J. C. 558; Arkwright v. Econs, 49 L. J. M. 82; Wake v. Hall, L. R. 8 Ap. Ca. 195; 52 L. J. Q. B. 494.

Immemorial usage for the inhabitants of a town or Customs to parish to take profits in the land of another, which is void take profits by presumed as a legal custom by the rule above stated, may in some crown grant. cases be legalised upon the presumed origin of a crown grant; which, by reason of the prerogative power of the crown to create corporations, would have the implied effect of incorporating such persons for the purpose of receiving the grant and retaining the rights granted, otherwise the grant would fail for want of a certain grantee (h). Thus a grant made by the crown to the inhabitants of a parish, being a manor of the crown, of the right to cut wood for fuel upon the wastes of the manor during certain parts of the year, was held valid as incorporating the inhabitants for the purpose of taking the grant (i). Inhabitants thus claiming as incorporate grantees must sue collectively on behalf of the whole body; they cannot sue individually each in his own right, as in the case of an individual claiming under a custom, who may sue in his own name and in his own right (j).—The presumption of a crown grant is made in favour of usage if it be possible under the circumstances, in order to supply a legal origin of the usage; for "the rule of law is that, wherever there is an immemorial usage, the Court must presume everything possible, which could give it a legal origin "(k). But the presumption cannot be made where it is inconsistent with the evidence of usage, or where it is inconsistent with a clearly proved origin of the right (l).

In like manner, if an Act of Parliament vests rights in No presumppersons, which they cannot take otherwise than as a cor-tion of staporate body, they are impliedly incorporated by legislative

<sup>(</sup>h) Per cur. Rivers v. Adams, L. R. 3 Ex. D. 365; 48 L. J. Ex. 47; Jessel, M. R., Chilton v. London, L. R. 7 C. D. 741; 47 L. J. C.

<sup>(</sup>i) Willingale v. Maitland, L. R. 3 Eq. 103; 36 L. J. C. 64; explained in Chilton v. London, supra-(j) Chilton v. London, L. R. 7 C. D. 735; 47 L. J. C. 433. See

ante, p. 550. (k) Mansfield, C. J., Cocksedge v. Fanshaw, 1 Dougl. 132; Selborne, L. C., Goodman v. Saltash, L. R. 7 Ap. Ca. 640.

<sup>(</sup>l) Rivers v. Adams, L. R. 3 Ex. D. 361; 48 L. J. Ex. 47; Goodman v. Saltash, L. R. 7 Ap. Ca. 633.

authority for the purposes of the Act (m). But no presumption can be made of the existence of an Act of Parliament as the origin of a usage, similar to the above presumption of a Crown grant; "for such presumption would make all unreasonable customs good"; also because "the judge is theoretically bound to take judicial notice of all Acts of Parliament, and to be aware that there is no such Act of Parliament" (n).

Customs under grant to corporation.

A corporation may take by grant or by prescription any profits of land which may be the subject of grant; and by immemorial usage the profits granted may be taken by the individual members of the corporation, or by inhabitants or freemen of a town or borough, according to the rules of the corporation; although such persons collectively, without incorporation, could not become entitled to take directly in their own right, either by grant or by custom (o). Accordingly, where an immemorial usage showed that a right of several fishery had been exercised by a borough corporation and their lessees; and that during part of the year the free inhabitants of the borough had exercised a right of fishing in the same place, it was held that the presumptive origin, in order to legalise the usage, was that there was a grant to the corporation with a trust or condition in favour of the free inhabitants in accordance with the usage (p).—Profits à prendre are frequently found thus vested by immemorial usage in borough corporations for the use and benefit of burgesses, or of inhabitants, or of some particular class of such persons: as a right of common of pasture to be enjoyed by every burgess for his commonable cattle (q); an exclusive right of pasturing an unlimited number of cattle during a

<sup>(</sup>m) Tone Conserv. v. Ash, 10 B. & C. 349; Ex parte Newport Marsh Trustees, 16 Sim. 346.
(n) Per cur. Weekly v. Wildman, 1.Ld. Raym. 407; Jessel, M. R., Chilton v. London, L. R. 7 C. D. 740; 47 L. J. C. 437.
(a) 1 Was Saynd. 346 a. Mellon

<sup>(</sup>o) 1 Wms. Saund. 346 a, Mellor

v. Spateman; Goodman v. Saltash, L. R. 7 Ap. Ca. 633; Re Faversham Free Fishermen, L. R. 36 C. D. 329. (p) Goodman v. Saltash, supra. (q) Mellor v. Spateman, 1 Wms. Saund. 343; Parry v. Thomas, 5 Ex. 37; Beadsworth v. Torkington, 1 Q. B. 782.

certain season by the burgesses (r); a right for the freemen or the inhabitants of the borough to cut turf and to take gravel, clay, and other materials for their own use (s); a right of several fishery to be enjoyed by the inhabitants of the borough (t).

Immemorial usage for the inhabitants of a town or parish, Customs or other indeterminate persons, to take profits of land may charitable also be supported in some circumstances as a charitable use uses. or trust. Such persons, though they cannot, without incorporation, be made grantees of any legal estate or interest, may be made the beneficial recipients; and "a gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is a charitable trust" (u). grant of land "that as many of the inhabitants of a parish as were able to buy three cows might feed them on the land from May till August," was established as a charitable trust (v). An alleged grant of the Crown to the inhabitants of a parish, being a Crown manor, that the poor people inhabiting the parish might cut fuel for their own use upon the wastes of the manor, was supported upon demurrer, as impliedly incorporating the inhabitants for the purpose of taking the grant of profit, but as trustees of a charitable trust for the poor (w). Upon the same principle it was held that a right given by an Inclosure Act, for the occupiers for the time being of ancient cottages in the inclosed district to cut turf for their own use in certain waste land, was a charitable use; in which the owners of the cottages had no interest beyond that the value of the occupation of their cottages might be thereby

<sup>(</sup>r) Johnson v. Barnes, L. R. 8 C. P. 527; 41 L. J. C. P. 250.

<sup>(</sup>s) White v. Coleman, Freem. 135; The King v. Warkworth, 1 M. & S. 473; The Queen v. Alnwick, 9 A. &

<sup>(</sup>t) Goodman v. Saltash, L. R. 7 Ap. Ca. 633.

<sup>(</sup>a) Selborne, L. C., L. R. 7 Ap.

Ca. 642; per cur. Re Christchurch Inclosure Act, L. R. 38 C. D. 531. (v) Wright v. Hobert, 9 Mod. 64.

<sup>(</sup>v) Willingale v. Maitland, L. R. 3 Eq. 103; 36 L. J. C. 64; Jessel, M. R., Chilton v. London, L. R. 7 C. D. 738. See Re Christohurch Inclosure Act, L. R. 35 C. D. 355; 56 L. J. C. 674.

increased (u). And a gift to the copyholders of a manor, to take the wood growing from time to time upon certain land for the repair of sea walls within the manor, was held to be a gift for a charitable use (v).

Customs of manors.

Customary rights of copyhold tenants.

The customs of manors by which rights and profits are claimed by tenants of the manor, freehold and copyhold, over lands of the manor are not open to the legal objections to customs, above stated, of being unreasonable as depriving the owner, or as claiming profits à prendre. Customary rights are claimed by the tenants of a manor as appurtenant to their tenements, and therefore as originally derived from a grant of the lord. The custom of the manor prescribes the appurtenant rights, and may annex rights of common or any other profits which are within the power of the lord to grant.—Copyhold tenants, whether in fee or for life or for years, claim rights and profits over land of the manor by custom; as also they claim the customary estate in their tenements, of which, except by custom, they were at common law only tenants at will. They cannot claim by prescription in their own right, because they have no sufficient legal estate; and they cannot prescribe in right of the lord as the freeholder, because the lord cannot have common in his own soil. Therefore they can claim by custom only; and the custom is good in law, though it be to take a profit in the soil of another, because it annexes the profit to the tenement, and not to the person of the copyholder (w). Thus by special custom copyhold tenants may claim to take profits from the waste of the manor; as common of pasture, estovers for repairs or fuel, quarrying stone, digging sand and the like (x). By custom copyholders may be entitled to common, subject to a payment to the lord in money or in kind;

(v) Wilson v. Barnes, L. R. 38 C. D. 507.

<sup>(</sup>u) In re Christehurch Inclosure Act, L. R. 38 C. D. 520.

<sup>(</sup>w) See ante, p. 343; Foiston v. Crachroode, 4 Co. 31b; Gateward's case, 6 Co. 60b; per cur. Rogers v. Brenton, 10 Q. B. 61. (x) Ante, p. 343.

and the payment may be a condition precedent or subsequent according to the custom (y). By custom copyholders may have the right to take coal and other minerals in the waste of the manor; and a custom for the tenants to dig coal, stated in the terms of a customary of the manor to be propriis usis, was construed to mean for their own consumption only, and to be valid (z). The onus of proving the special custom of a manor lies upon the tenant claiming under it (a).

Freehold tenants of a manor may claim by grant or Freehold prescription according to the general rule; but they may tenants. also have rights and profits over other land of the manor as appurtenant to their tenements by custom. If the usage is clearly proved, the Court will presume grants in conformity with it, upon the general principle of referring immemorial usage to a legal origin, if possible. "It would not be unreasonable to hold that the right had originated in the grant to every freehold tenant of all the rights and privileges which every other freehold tenant had. It may be that the tenants had separate grants, and that a particular grant was free from some claim or demand on the part of the lord from which others were not free; but that would not prevent their having certain privileges in common with others" (b). Thus, freehold tenants of a manor may be entitled by custom to common appendant; which was appurtenant to their tenements by general custom or common law before the Statute of Quia Emptores (c). So, a custom for the occupiers of land in a parish to have common appurtenant upon waste land of the parish, with the incidental right of cutting rushes upon the waste to be used for litter for their commonable cattle, was supported as an appurtenance of the tenements (d). Upon the same

<sup>(</sup>y) Gray's case, 5 Co. 78 b; Cro. Eliz. 405; Lovelace v. Reynolds, Cro. Eliz. 546, 563. See Paddock v. Forrester, 3 M. & G. 927.
(z) Portland v. Hill, L. R. 2 Eq. 765; 35 L. J. C. 439.

<sup>(</sup>a) Ib.; ante, p. 63. (b) Warrick v. Queen's College, L. R. 6 Ch. 716; 40 L. J. C. 780.

<sup>(</sup>c) Ante, p. 336. (d) Bean v. Bloom, 2 W. Bl. 926; 3 Wils. 456.

principle the free and customary tenants within the bounds of an ancient forest may claim by custom to have common of pasture and other common rights over all the wastes of the forest, as appurtenant to their tenements; and such customary rights, as originating in Crown grants, are held to be paramount to the local rights of lords of manors within the forest to inclose waste; the Crown in granting the manors having presumedly reserved the forestal rights (e).—If the copyhold and freehold tenants of a manor have similar customary rights they may join in claiming them. "The copyholders might by custom be entitled to that to which the freeholders are entitled by prescription; and if the rights are identical, both classes might well join in a suit against the lord if he should attempt to exclude them "(f).

Occupiers.

There can be no custom that "occupiers," or "inhabitants," in a manor or district, merely as such, should have rights of common or other profits, except as appurtenant to tenements occupied or inhabited; because a profit à prendre cannot be claimed by custom (g). But a custom alleged for "owners and occupiers" to have common rights was construed as claiming the rights as appurtenant, the occupiers in fact enjoying them in right of the owners (h). And a usage proved of common rights by the freehold tenants of a manor and also by the inhabitants, was presumed by the Court to be used by the inhabitants as appurtenant to their tenements, and in right of the freeholders (i). Customary rights of occupiers, or inhabitants. or like classes of persons to take profits of land may also be supported in some cases as being charitable uses (i).

(j) See antc, p. 567.

<sup>(</sup>e) Sewers Commiss. v. Glasse, L. R. 7 Ch. 456; L. R. 19 Eq. 134; 44 L. J. C. 129; Earl De la Warr v. Miles, L. R. 17 C. D. 535; 50 L. J. C. 754. See ante, p. 84. (f) Hatherley, L. C., Betts v. Thompson, L. R. 6 Ch. 739; Potter v. North, 1 Wins. Saund. 350; Fisher v. Wren, 3 Mod. 250; ante,

p. 371.

<sup>(</sup>g) Ante, p. 560; Hardwicke, L. C., Dean of Ely v. Warren, 2 Atk. 190; Austin v. Amhurst, L. R. 7 C. D. 689; 47 L. J. C. 467.

<sup>(</sup>h) Sewers Commiss. v. Glasse, L. R. 7 Ch. 456; 41 L. J. C. 409. (i) Warrick v. Queen's College, L. R. 6 Ch. 716; 40 L. J. C. 780.

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